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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

vs.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 1, 1938
CERTIORARI GRANTED APRIL 28, 1938

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SUPREME COURT OF THE UNITED STATES

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FEDERAL POWER COMMISSION, PETITIONER

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METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States Circuit Court of Appeals for the Third Circuit

No. 6447. Petition for a Stay

IN THE MATTER OF THE APPLICATION OF METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

Petition for rule to show cause and for stay of proceedings

Filed April 21, 1937

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The Petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company respectfully shows to this Court and states that:

1. Said petitioners, and each of them, are corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and are engaged in the business of the generation and/or transmission and/or sale of electric energy
2 within said Commonwealth; and the principal place of business of each of the petitioners is located within the Third Circuit of the United States Circuit Court of Appeals.

2. The Federal Power Commission is a Federal administrative body created by Act of the Congress of the United States and is composed of Frank R. McNinch, Chairman, Basil Manly, Herbert J. Drane, Claude L. Draper, and Clyde L. Seavey, who are individually and as such Commissioners hereinafter sometimes collectively referred to as the "Federal Commission."

3. Heretofore, and on the 6th day of January 1936, said Federal Power Commission made a certain order entitled by said Commission—"Order of Inquiry and Investigation of Metropolitan Edison Co. et al." (Docket No. IT5015), by which said order said Commission purported to institute an inquiry and investigation with respect to the petitioners herein, who were designated in said order as "respondents."

4. Said order of January 6, 1936, further recited certain representations by the Governor and the Public Service Commission of the Commonwealth of Pennsylvania (hereinafter referred to as the "Pennsylvania Commission"), which representations purported to be constituted of matters developed in the course of an inquiry by the Public Service Commission of Pennsylvania prosecuted with respect to the petitioners herein and others. Said inquiry and investi-

gation instituted by the Federal Commission's said order of January 6, 1936, was so instituted at the instigation of the Governor and the Pennsylvania Commission, and was so instituted as an investigation ancillary to and in aid of the inquiry and investigation then being carried on by the Pennsylvania Commission against petitioners and others.

3 5. The inquiry and investigation instituted and carried on by the Pennsylvania Commission against petitioners and others related and now relates to the local and intrastate affairs of petitioners and has for its purported object the enforcement of the Public Service Law of the Commonwealth of Pennsylvania and the imposition of penalties against petitioners for alleged violations of the Pennsylvania law.

6. The petitioners have filed returns or answers to the Federal Commission's said order of January 6, 1936, challenging the jurisdiction and power of the Federal Commission to make said order in the premises and reserving all rights of every kind to question the legality of said order and the authority of said Commission to make the same. Said returns or answers further responded to the Commission's said order of January 6, 1936, and furnished various data and information.

7. Thereafter, by an order made on March 6, 1936, the Federal Power Commission accepted the Pennsylvania Commission's offer of the services of certain of its accountants, including one J. A. Wilhelm, to act as examiners and/or investigators for the Federal Commission, without compensation, and by said order of March 6, 1936, said Wilhelm and others were designated as examiners of the Federal Commission to assist in the conduct of the investigation which was then proceeding pursuant to the aforesaid order of January 6, 1936.

8. Thereafter, an examination of books and records of petitioners was made and a so-called report was purportedly made therefrom prepared by two of the Federal Power Commission's examiners, to wit: said J. A. Wilhelm, regularly in the employ of the Pennsylvania Commission and paid by it, and Harry L. Osman, and said report, dated December 10, 1936, was presented to the

4 Federal Commission. Said report purports to contain matters of fact found by the Federal Power Commission's examiners, various conclusions of said examiners, and their recommendations thereon.

9. Following the making of the aforesaid report, the Federal Commission made an order, dated January 26, 1937, fixing a hearing to be held on March 3, 1937, in the Commission's Hearing Room in Washington, D. C., and further requiring that petitioners (respondents named in said order) and thirty-five other persons, firms, and corporations appear at said hearing and produce various books, papers, and records. Said order contained further a notice that the matters assigned for hearing thereunder would be heard by the Federal Commission sitting jointly with the Pennsylvania Commission.

10. The Federal Commission's said order of January 26, 1937, was in furtherance of the inquiry and investigation instituted by its said order of January 6, 1936, and was an order which under the terms of the Federal Power Act constrained the Petitioners herein to obedience thereto, under penalty, unless annulled or suspended by the Federal Power Commission or by judicial decree on review of said order.

11. The petitioners, believing themselves to be aggrieved by the order of January 26, 1937, and by the investigation instituted by the order of January 6, 1936, as to the legality of which and the jurisdiction and power of the Commission to make the same, the right to object had been reserved as hereinabove set forth, thereupon sought to obtain a Court review of said order.

12. The provisions of the Federal Power Act (Section 313) require, as a condition precedent to the obtaining of a Court review of any order of the Commission by a person aggrieved thereby, that
5 such person apply to the Commission for a rehearing upon any such order, within thirty days after the issuance thereof, setting forth specifically the grounds upon which such application is based. The Federal Power Act further provides that following the within sixty days after the order of the Federal Power Commission upon the application for rehearing, the order of the Commission as to which the person is aggrieved may be reviewed by the Circuit Court of Appeals of the United States for the Circuit wherein such persons is located or has its principal place of business; and that no objection to the order of the Commission shall be considered by the Court unless such objection shall first have been urged before the Commission in the application for rehearing.

13. Therefore, the petitioners, in order to obtain a review by the appropriate appellate court of the Commission's said order of January 26, 1937, filed with the Federal Power Commission, on February 23, 1937, within the time prescribed by the Federal Power Act, a Petition for Rehearing, in which Petition petitioners prayed (a) that a rehearing be granted, (b) that upon such rehearing the Commission vacate its order of January 26, 1937, and terminate the proceedings purported to be instituted by its order of January 6, 1936, and (c) that pending the disposition of such Petition all further proceedings be stayed and suspended. A true and correct copy of said Petition for Rehearing and the exhibits annexed thereto so filed is annexed hereto and marked "Exhibit A." Said Petition for Rehearing and exhibits annexed contains in full text the Commission's said orders of January 6, 1936, and of January 26, 1937. Subsequent to the filing of the Petition for Rehearing and, on February 24, 1937, the Federal Power Commission made a further order reciting the filing of the Petition for Rehearing with respect to the order of January 26, 1937, and
6 reciting further the application of the Governor of the Commonwealth of Pennsylvania for a postponement of the hearing set by said order, and ordered that such hearing, set for March 3, 1937, be continued without day.

14. By notice dated March 24, 1937, counsel for petitioners were informed that the Petition for Rehearing had been granted by the Commission and that a hearing thereon had been fixed for April 14, 1937, at the Commission's Hearing Room in Washington, D. C. Said notice in its full text is as follows:

"Notice is hereby given that the Federal Power Commission, on March 23, 1937, granted the petition for rehearing, filed in the above matter by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, and assigned the matters involved in this proceeding for hearing in the hearing room of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

"By the Commission:

"LEON M. FUQUAY, *Acting Secretary.*"

15. The petitioners and their counsel assumed, on the receipt of this notice, that the Petition for Rehearing had been granted, that the hearing to be held on April 14, 1937, of which notice was given, was to be a hearing relating solely to the objections raised by the petitioners in their Petition for Rehearing, and did not assume that the Commission would attempt to proceed with the matters purportedly to be investigated pursuant to the orders of January 26, 1937, and January 6, 1936, and assumed further that the word "proceeding," as used in the statement contained in the notice of hearing that
7 the Commission had "assigned the matters involved in this proceeding for hearing," referred, not to the matters involved in the entire investigation under said order of January 26, 1937, which was objected to, but solely to the matters of objection raised by the Petition for Rehearing.

16. The jurisdiction and powers of the Federal Power Commission are prescribed and limited by the Federal Power Act. Title II of said Act is applicable only to "public utilities" as defined therein. A "public utility" is defined as a "person who owns or operates facilities subject to the jurisdiction of the Commission under this Part" (Federal Power Act, Sec. 201 (e)). Under Section 201 (b) of the Federal Power Act the provisions of Part II thereof apply only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, and confer on the Commission jurisdiction only over facilities for such transmission or sale of electric energy. Three of the petitioners, to wit: Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, are not such "public utilities," as defined in the Federal Power Act, and claim that accordingly the Federal Power Commission is without jurisdiction to conduct any inquiry and investigation into their affairs or to make any order directed to them made in the course of any such purported investigation. This objection is specifically raised by the Petition for Rehearing, Exhibit A.

17. The Federal Power Commission's order of January 6, 1936, purporting to institute said inquiry and investigation of petitioners,

purports to be directed to an investigation of contracts and working arrangements between petitioners and any person who controls, directly or indirectly, the petitioners or who is controlled by any such
8 person, as well as charges paid or obligations incurred thereunder. The petitioners claim that the Commission is without jurisdiction, under the terms of the Federal Power Act or otherwise, to inquire into or to investigate this subject matter; that the propriety of contracts or working arrangements between petitioners and others or the reasonableness of charges thereunder is beyond the power and jurisdiction of the Commission to determine; and that particularly in the absence of a complaint with respect to contracts or working arrangements between petitioners and others, an investigation thereof is beyond the jurisdiction of the Commission, under the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

18. The Federal Power Commission's order of January 6, 1936, purporting to institute the inquiry and investigation of petitioners, purports to be directed to an investigation of the cost to persons rendering services to petitioners, of such services. The petitioners claim that the Commission is without jurisdiction, under the terms of the Federal Power Act or otherwise, to inquire into or to ivestigate this subject matter; that the Federal Power Act contains no provision requiring that services rendered to petitioners be rendered at cost and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by petitioners for services rendered to them exceed the cost thereof to the persons rendering them; and that the investigation in this regard and any order made in furtherance of it are beyond the jurisdiction and powers of the Commission, under the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

9 19. The petitioners further claim that the investigation purported to be instituted by the Commission's order of January 6, 1936, is not limited to facilities over which the Commission is given jurisdiction by the Federal Power Act but relates to contracts and working arrangements between the petitioners and others and charges made thereunder and the cost of services to persons supplying the same to petitioners, all of which are local matters, are not matters of interstate commerce, and are not matters the power or jurisdiction to investigate as to which is conferred on the Commission by the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

20. The petitioners claim further that the real purpose of the investigation by the Federal Commission, pursuant to its order of

January 6, 1936, and in purported aid of which its order of January 26, 1937, was made, was to assist the Pennsylvania Commission in the prosecution of the proceedings instituted by it against petitioners and others to impose penalties for alleged violations of the Public Service Law of Pennsylvania; that the Federal Commission has no jurisdiction or power to prosecute an investigation for any such purpose; and that any order of the Federal Commission made in furtherance of an investigation carried on for any such purpose must be annulled.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

21. On April 14, 1937, the petitioners appeared by their counsel before the Federal Power Commission for the hearing set by the Commission's notice of March 24, 1937, purportedly notifying
10 petitioners that their Petition for Rehearing had been granted.

The petitioners, after being denied by the Commission the right to inspect in said hearing or otherwise the correspondence between the Governor of Pennsylvania and the Federal Commission and between the counsel for the Pennsylvania Commission and the counsel for the Federal Commission, respecting the investigation and its purposes, and after being referred to a so-called official file which it developed did not contain all of the records relating to the investigation, proceeded with the introduction of evidence. This evidence tended to establish the claim, hereinabove set forth in paragraph 16, that the petitioners Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company are not public utilities as defined by the Federal Power Act, and are not therefore subject to the jurisdiction of the Federal Power Commission, as such. The evidence adduced further tended to establish that the investigation was instituted for the purpose of supplying information to the Pennsylvania Commission for use by that Commission in proceedings against Petitioners and others relating to purely local and intrastate matters and having for their object the imposition of penalties for alleged violations of the State law. No other evidence was introduced by the petitioners because no other questions of fact were presented or were intended to be presented by the objections contained in the Petition for Rehearing, Exhibit A, the determination of which was either necessary or appropriate to a consideration or determination of the primary jurisdictional objections raised by respondents in their Petition for Rehearing. The other objections, which raise purely legal questions, are determinable by a resolution of the matters appearing on the face of the orders of January 6, 1936, and January 26, 1937, with the controlling provisions of law, and require no factual evidence whatever for
11 their determination. The petitioners have rested subject to the furnishing of certain contracts and statements requested by the Commission's counsel.

22. Thereupon, the counsel for the Federal Power Commission commenced the introduction of evidence directed neither to a deter-

mination of whether Erie Lighting Company, The Clarion River Power Company, or Solar Electric Company are public utilities as defined by the Federal Power Act, nor to the purpose of the investigation, which Commission's counsel claimed to be immaterial, but proceeded instead with the introduction of evidence wholly immaterial to the only two factual issues presented by the Petition for Rehearing. The aforementioned accounting report of Messrs. Osman and Wilhelm purporting to contain various matters of fact relating to the affairs of petitioners and others, obtaining as a result of the Federal Commission's investigation, as well as the conclusions of the Commission's examiners with respect to the purported facts, was offered in evidence and the Commission's examiner, Osman, was asked to explain and did explain two tabulations contained in said report. Counsel for respondents have objected to the introduction of such evidence as improper on a hearing held pursuant to the Petition for Rehearing and the Commission's order granting the same. Nevertheless, the Commission's examiner before whom the hearing was and is being conducted overruled the objections, although it was apparent that the Commission's counsel intended to proceed with the introduction of all evidence which might have been introduced at the hearing directed by the order of January 26, 1937, as to which a rehearing was purportedly granted by the Commission, as aforesaid.

23. At the opening of the hearing on April 16, 1937, which had been adjourned from the previous day, on which previous day
12 petitioners' objections and the examiner's ruling as to the evidence introduced and to be introduced by Commission's counsel were made, counsel for the petitioners formally restated the petitioners' objections to the introduction of evidence in furtherance of the investigation and in furtherance of the order of January 26, 1937, as to which a rehearing had been granted; and pointed out clearly, as appears by the transcript of the testimony, which will be made available to this Honorable Court, that if the Commission's counsel was permitted to proceed in the manner indicated, the only result would be the holding of the hearing directed by the order of January 26, 1937, under the guise of granting a rehearing upon the petitioners' Petition for Rehearing, that thereby under such guise of granting petitioners' Petition for Rehearing filed for the purpose of obtaining a Court review of the Commission's order of January 26, 1937, the very matters complained of and objected to by the Petition for Rehearing would be proceeded with, and that petitioners would be effectively thwarted in their efforts, and would be denied the opportunity to review by this or any other Court. Petitioners' counsel thereupon requested the examiner to certify to the Federal Power Commission a request to define the issues to be determined by the examiner on the Petition for Rehearing, and to instruct its own attorneys that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced on the hearing on the Petition for Rehearing; and requested that no proceedings be taken pursuant to said orders until the question of the right of the Commission to make the orders be determined; and requested that the

proceeding before the examiner be stayed pending the reference of the requests to the Commission; and that counsel for petitioners be permitted to be heard by the Commission on the reference. In support of the aforesaid request, counsel for petitioners stated
13 fully and clearly, as appears by the minutes of testimony, the reasons sought to be urged before the Commission for requiring the exclusion of evidence in furtherance of said order of January 26, 1937, on this rehearing by which a review of that very order was and is sought.

The examiner declined to certify the request to the Federal Power Commission and proceeded to make a determination of the request which he was asked to certify to the Commission for its determination.

24. The examiner thereupon ruled as follows:

"The Examiner will state now that, considering the searching nature of the petition that has been filed here, its factual allegations, and the other facts that he has recited, he expects to rule and does rule that Commission's counsel here may introduce evidence touching matters appearing on the books of the respondent corporations, evidence relating to the affiliation of the respondent public utilities with other electric utilities and with companies whose charges appear on the books of the public utility respondents in this proceeding, and with relation to such charges; as well as to the business operation, contracts, and records of respondents [is] if that will aid in determining the jurisdictional questions here raised. That is the ruling of the Examiner."

25. This ruling of the examiner, as above set forth, made plain that it was and is the purpose of said examiner to permit counsel for the Federal Power Commission to proceed with the investigation and with the introduction of evidence in furtherance thereof and in furtherance of the order of January 26, 1937, under the guise of a rehearing upon said order, despite the fact that the hearing set by said order had been adjourned without date. It
14 was further made plain that the examiner neither had nor has any intention of affording to petitioners the opportunity of a review of said order of January 26, 1937, but that under the guise of granting a hearing in connection with the review sought by them, any opportunity of the petitioners to obtain a determination of the power of the Commission to make the order complained of and to carry on the investigation in aid of which it was made, is to be effectively denied.

26. In a further effort to have this important fundamental matter referred to the Federal Power Commission for decision by it, counsel for petitioners requested that the examiner certify his ruling as to the scope of the hearing to the Commission. The examiner overruled this request.

27. The hearing proceeded and counsel for the Commission introduced evidence, all of which was in furtherance of the order of January 26, 1937, and of the investigation in the aid of which said

order was made. Said hearing on April 16, 1937, was then adjourned to 11 A. M. on April 19, 1937.

28. Prior to the opening of the hearing on April 19, 1937, the petitioners herein presented a petition to the Federal Power Commission reciting the requests theretofore made to its examiner, as set forth in paragraphs 23, 24, and 26 hereinabove, and setting forth the ruling of said examiner and praying for a determination of said requests by the Federal Power Commission itself. A copy of said petition is annexed hereto, marked "Exhibit B," and made a part hereof.

29. At the opening of the hearing on April 20, 1937, pursuant to continuance of the hearing on April 19, 1937, the Commission's Examiner announced the ruling of the Commission upon the
15 petition to the Commission referred to in the preceding paragraph hereof. The Commission's ruling was as follows:

"The Commission having considered the allegations contained in the petition of respondents, entitled 'Petition of Respondents for an Adjudication in respect to the Petition for a Rehearing filed February 23, 1937,' this day offered for filing, finds that the same relates to matters now delegated by this Commission to the Trial Examiner in charge of the hearing in the above-entitled matter; that the rules of practice and regulations of the Commission do not provide for the method of interim review of the Examiner's rulings attempted by the offer to file the said petition, and the petition is therefore referred to the Examiner for disposition by him."

The Examiner thereupon ruled as follows:

"The Examiner holds, in accordance with the Commission's ruling, that the petition offered for filing on yesterday morning by the respondents cannot at this time be entertained by the Commission or the Examiner under the rules of practice and regulations of this Commission; and further, that the rights of the respondents can be amply protected by the usual method of exceptions and the argument on those exceptions before the Commission in advance of any determination by the Commission of the final result of this hearing upon the respondents' petition."

30. Following the ruling of the Federal Power Commission and of the Examiner as set forth in the preceding paragraph hereof, Counsel for the Commission continued, with the sanction of the Commission's Examiner and the Commission, to proceed with the introduction of evidence in furtherance of the investigation and in furtherance of the order of January 26, 1937, as to which a court review is sought in the same manner as had been done
16 prior to the ruling of the Commission and of its said Examiner and in the same manner as hereinabove set forth in Paragraphs 22 to 27, inclusive, hereof; and the Commission, its Examiner and Counsel are proceeding and will continue to proceed with the investigation under the Commission's orders of January 6, 1936, and January 26, 1937, under the guise of a rehearing upon said order.

31. Such procedure on the part of counsel for the Federal Power Commission, sanctioned by the Commission's examiner and the Commission itself, constitutes an effective destruction of petitioners' right to a Court review of the Commission's order of January 26, 1937, as to which the Petition for Rehearing, Exhibit A, was filed.

32. Said procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, prevents the orderly review by this or any other Court of the primary jurisdictional questions raised by the Petition for Rehearing, despite the fact that such objections are fundamental and go to the root and essence of the entire proceeding, and despite the fact that such objections, if sustained, will render nugatory all further proceedings and evidence which may be had or adduced as part of the Commission's inquiry and investigation directed to petitioners.

33. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, if permitted to continue, will require lengthy and protracted further hearings, the expenditure of a long period of time and of great effort, both on the part of the Commission and its counsel and of the respondents and their counsel, and will require the expenditure of substantial sums of money, all of which time, money and
17 effort will be wasted and expended to no purpose whatever if petitioners' fundamental objections to the jurisdiction and power of the Commission, as hereinabove set forth, and as set forth in the Petition for Rehearing, Exhibit A, are sustained.

34. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, presupposes the validity of the very order and investigation, the legal right to make which is questioned by the Petition for Rehearing, Exhibit A, and in so doing begs the questions involved, and not only completely waives the same aside, but at the same time effectively prevents an orderly and speedy determination of the same, in accordance with the provisions of the Federal Power Act.

35. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, is now resulting and will result in proceedings and action by the Commission entirely beyond the jurisdiction and powers conferred upon it by the Federal Power Act; and is now resulting and will result in an investigation into and interference with affairs and matters of and between petitioners and others, which affairs and matters are not subject to the control or jurisdiction of the Federal Power Commission under the Federal Power Act and/or of the Congress of the United States or any of its subordinate agencies under the Constitution of the United States and Article I, Section 8 and Amendment X thereof; and is now resulting and will result in the deprivation of the petitioner's rights, property, and liberty without due process of law in contravention of the Constitution of the United States and Amendment V thereof.

36. Your Petitioners aver that unless the Federal Power
18 Commission and each of the members thereof, their counsel and representatives are enjoined and restrained from continuing to conduct the hearings on the Petition for Rehearing in the manner in which they have been conducted and in the manner in which they will, as appears from the ruling of the Commission's Examiner and the procedure followed and proposed to be followed by the Commission's Counsel, continue to be conducted, the Commission under the guise of granting a rehearing to petitioners will have completed the very investigation the right and power to conduct which is questioned, and any determination of such right and power by your Honorable Court will have become moot.

37. Unless the Federal Power Commission, and each of the members thereof, its counsel, examiners and representatives, are enjoined and restrained by this Honorable Court from continuing to conduct the hearings, as aforesaid, on the Petition for Rehearing, in the manner in which such hearings have been and will continue to be conducted, as appears from the rulings of the Commission's examiner and the procedure followed and proposed to be followed by the Commission and its counsel, this Honorable Court will be effectively deprived of its jurisdiction to grant a review, under the Federal Power Act or otherwise, of the order of said Commission as to which a rehearing was sought as a condition precedent to such review; the intent of Congress in enacting in the Federal Power Act provision for review of the Commission's actions and orders will be defeated; the petitioners will be deprived of their right to obtain such review, as provided by law, and will be forced to proceed as parties to an inquiry and investigation which, for fundamental and basic jurisdictional reasons, they believe to be improperly instituted and prosecuted, without any opportunity whatever of obtaining a determination of the propriety of said inquiry and
investigation until the same shall have been concluded and its
19 improper and unlawful purposes accomplished at a time possibly long in the future; and the petitioners will be forced to expend large sums of money and much time and effort, which will be completely wasted, and the private affairs of petitioners and others will be delved into improperly and at length, without due process of law and in violation of the provisions of the Federal Power Act and of the Constitution of the United States, all to petitioners' irreparable damage and injury, and all because the Federal Power Commission is now attempting to conduct an investigation pursuant to an order, the power to make which has been duly challenged, under the guise of a rehearing incident to a review of said order by this Court.

38. Your Petitioners aver that they have no adequate remedy at law and have no remedy save by application to this Honorable Court for the relief herein prayed for.

Wherefore, your petitioners pray:

(A) For an order—

(1) Enjoining and restraining the Federal Power Commission, its members, counsel, and representatives, from taking any steps or proceedings in furtherance of or in connection with the inquiry and investigation purported to be instituted by the Commission's order of January 6, 1936, or the Commission's order of January 26, 1937, made in aid of said investigation and as to which the Petition for Rehearing, Exhibit A, was filed, until said Petition for Rehearing has been disposed of by the Commission and opportunity afforded to petitioners for a review of such disposition by this Court;

(2) Enjoining and restraining the Federal Power Commission, its members, counsel, examiners, and representatives from introducing or attempting to introduce any evidence at any hearings upon the
20 Petition for Rehearing, Exhibit A, tending to further or coming within the scope of the Commission's said inquiry and investigation and the order of said Commission dated January 26, 1937;

(3) Enjoining and restraining the Federal Power Commission, its members, counsel, examiners, and representatives from introducing or attempting to introduce any evidence at any hearings upon the Petition for Rehearing, Exhibit A, except such evidence as may be relevant to proof (a) that Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company are "public utilities" within the terms of the Federal Power Act, or (b) that the Commission's inquiry and investigation and the orders made as incidents thereof, were not instituted, and are not prosecuted and made for the purpose of obtaining information for use by the Public Service Commission of the Commonwealth of Pennsylvania; and

(4) Directing the Federal Power Commission, its members, counsel, examiners, and representatives, to proceed with the disposition of the Petition for Rehearing, Exhibit A, and the hearings to be had on said petition, without further efforts to proceed with its purported inquiry and investigation under the guise of a rehearing.

(B) For an order directing the Federal Power Commission, its members, counsel, examiners, and representatives to show cause before it at a time and place to be fixed in said Order to Show Cause why an Order should not be made, as prayed for in Subdivision (A) of this prayer for relief;

(C) That pending the hearing and determination of this Petition, this Honorable Court temporarily enjoin and stay all proceed-
21 ings on the part of the Federal Power Commission in connection with its purported inquiry and investigation and upon the Petition for Rehearing, Exhibit A;

(D) For such order and further relief as this Honorable Court may deem just and proper in the premises.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY,
By WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAUL, EWING, REMICK & SAUL,
2301 Packard Building, Philadelphia, Pa.
TRAVIS, BROWNBACK & PAXSON,
61 Broadway, New York, N. Y.,
Attorneys for Petitioners.

22 [*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

23 *Exhibit A to petition*

Before the Federal Power Commission

Docket No. IT5015

IN RE: METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, SOLAR ELECTRIC COMPANY

Petition for rehearing

To the Federal Power Commission:

The Petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company for a rehearing with respect to the Order of the Federal Power Commission made herein on the 26th day of January, 1937, respectfully represents that:

First. The exact legal names and post office addresses of the petitioners are as follows:

Metropolitan Edison Company, 412 Washington Street, Reading, Pa.

24 Northern Pennsylvania Power Company, 207 Main Street, Towanda, Pa.

Pennsylvania Electric Company, 222 Levergood St., Johnstown, Pa.

Erie Lighting Company, Erie, Pa.

The Clarion River Power Company, 222 Levergood St., Johnstown, Pa.

Solar Electric Company, Brookville, Pa.

Second. The names and post office addresses of your petitioners' attorneys to whom all correspondence with regard to this petition should be addressed are as follows:

Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia, Pa.

Travis, Brownback & Paxson, 61 Broadway, New York, N. Y.

Third. All of the petitioners are corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and are engaged in the business of the generation, and/or transmission and/or sale of electric energy within said Commonwealth.

Fourth. This petition is made for a rehearing with respect to a certain order made herein by the Federal Power Commission (hereinafter referred to as the "Commission"), on January 26, 1937, and for the vacation of said order on the following grounds:

25 (1) that said order was made in pursuance and as part of an investigation heretofore instituted by the Commission and now being prosecuted by it, relating to solely local and intrastate matters, and instituted and prosecuted for the sole purpose of supplying information to the Public Service Commission of the Commonwealth of Pennsylvania (hereinafter sometimes referred to as the "Pennsylvania Commission"), to assist the Pennsylvania Commission in the prosecution of certain proceedings instituted and now being prosecuted by it, relating to solely local and intrastate matters, and having for their object the enforcement of Pennsylvania statutes, and rules of the Pennsylvania Commission, and the imposition of penalties prescribed by the laws of the Commonwealth of Pennsylvania;

(2) that the Commission is without jurisdiction of the petitioners herein in the premises;

(3) that the Commission is without jurisdiction of the subject matter of said investigation;

(4) that said investigation and said order invade the rights of petitioners guaranteed to them by the Constitution of the United States;

(5) that said order is not authorized by the Federal Power Act;

(6) that if said investigation and said order are authorized by the Federal Power Act, then said Act is in violation of the Constitution of the United States;

all as more fully hereinafter set forth.

Fifth. During the months of August, September, and October 1935, proceedings were instituted by the Pennsylvania Commission against petitioners and Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company. Said proceedings were instituted by rules or

26 orders of the Pennsylvania Commission and related and relate solely to the local and intrastate affairs of petitioners and the other persons to whom said proceedings were directed. Said rules or orders required, inter alia, that cause be shown why penalties provided by the laws of the Commonwealth of Pennsylvania should

not be imposed upon petitioners, in said proceedings for alleged violations of the laws of said Commonwealth. Returns were duly filed by the persons against whom the rules or orders were directed, including petitioners, and the Pennsylvania Commission thereupon proceeded to make examinations and to hold hearings. Said proceedings so instituted by the Pennsylvania Commission continue to be pending and are now being prosecuted by it.

Sixth. Prior to January 6, 1936, the hearings in the aforesaid proceedings by the Pennsylvania Commission were adjourned, and certain representations were made by or on behalf of the Pennsylvania Commission and the Governor of the Commonweath of Pennsylvania to this Commission, and the aid of this Commission was enlisted to secure information to assist the Pennsylvania Commission in the enforcement of said Pennsylvania statutes, the rules of said Pennsylvania Commission, and the penalties involved in the proceedings pending before it and in its investigation relating to the local and intrastate affairs of petitioners and the other persons against whom its proceedings were pending. The Commission's official Press Release No. 20, dated November 26, 1935, announced that the previous week the Pennsylvania Commission had opened its said proceedings, and that, acting on the request of the Governor of Pennsylvania and the Pennsylvania Commission, this Commission would give its full cooperation "in obtaining certain information sought by the Pennsylvania Commission" in connection with its aforesaid proceedings. A copy of said Press Release No. 20 is
27 hereto annexed, marked "Exhibit A" and made a part hereof.

Seventh. This Commission thereupon on the 6th day of January 1936, claiming to act in pursuance of its powers under the Federal Power Act and, in particular, under the provisions of Parts II and III thereof, instituted, by its order dated the same day, an investigation the object of which was stated to be to determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of petitioners, who were designated by the Commission in said order as "respondents." A copy of said order of January 6, 1936, is hereto annexed, marked "Exhibit B," and made a part hereof. Simultaneously with the making of said order, Exhibit B, this Commission announced, in its official Press Release No. 30, dated January 6, 1936, that it had entered such order, and stated that: "the Federal Commission has advised the Pennsylvania authorities that at the appropriate time the joint hearing in connection with the investigation will be held with the Public Service Commission of Pennsylvania." A copy of said Press Release No. 30 is hereto annexed, marked "Exhibit C" and made a part hereof.

Eighth. Petitioners Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company are engaged in their aforesaid businesses wholly within the Commonwealth of Pennsylvania, and are not engaged in the business of transmission or sale of

electric energy in interstate commerce and neither own nor operate facilities for such transmission or sale of electric energy.

Ninth. The investigation directed to be instituted by the Commission's order, Exhibit B, was so instituted and has been and is now being prosecuted for the purpose of securing information
28 for the Pennsylvania Commission in the hereinabove described proceedings involving petitioners and others then and now pending before the Pennsylvania Commission.

Tenth. Pursuant to the direction of the Commission's order, Exhibit B, petitioners filed answers reserving their rights to question the validity of said order and the jurisdiction of the Commission in the premises, and furnished certain statements, contracts, data, and information, and made their books and records available to the Commission.

Eleventh. Since the filing of petitioners' answer, the Commission caused an investigation to be made of various books, records, accounts, and data of petitioners and other persons.

Twelfth. A Report (hereinafter referred to as the "Report") was made to the Commission, signed by two examiners, Harry L. Osman and J. A. Wilhelm. The Report is dated December 10, 1936. Said J. A. Wilhelm is regularly in the employ of the Pennsylvania Commission and was engaged in the aforesaid proceedings by the Pennsylvania Commission against respondents and others, which have been pending since prior to the making of the order, Exhibit B, to enable the Pennsylvania Commission to obtain information for the purposes herein alleged through the medium of an investigation conducted for it by this Commission. Said Wilhelm and other employees of the Pennsylvania Commission were deputized as examiners for this Commission to facilitate said investigation and further such purposes, and petitioners are advised that all but two of the examiners designated by the Commission as authorized by it to conduct such investigation were and are regular employees of the Pennsylvania Commission.

29 Thirteenth. The report concludes that various persons are "persons under the dominant control and management of the same persons who control respondents." The respondents referred to in said Report are the petitioners herein. The Report further concluded that full and complete records, books, accounts, memoranda, and correspondence of all such persons must be examined by representatives of the Commission, and the results of such examination made available to the Commission before it can determine (a) whether the contracts, working arrangements and practices as well as charges therefor which are paid by petitioners to the persons designated in said Report as "persons under the dominant control and management of the same persons who control respondents" are reasonable and proper; (b) whether the charges paid by respondents exceed the cost of the service rendered by such persons; (c) whether such contracts, working arrangements and practices violate the Federal Power Act, as amended, or any rule or regulation of the Federal

Power Commission issued pursuant to the authority of such Act; or (d) whether such contracts, working arrangements and practices or charges therefor warrant the adoption of rules or the issuance of orders by the Commission relating thereto.

Fourteenth. On January 26, 1937, the Commission adopted an order herein reciting the making of the Report and directing that a hearing be held at 10 A. M. on March 3, 1937, in its Hearing Room in Washington, D. C., to ascertain and determine all facts, conditions, practices and matters regarding the ownership, operation, management and control of petitioners; and all contracts and working arrangements between petitioners and any person who controls, directly or indirectly, the petitioners or who is controlled by any such person, and all expenditures and obligations incurred
30 thereunder that in any way affect or relate to the business of petitioners. Said order further directs that thirty-nine persons, including petitioners, appear at said hearing and present thereat for the record for the years 1934, 1935, and to date—

"* * * full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them and any of the persons named above controlled, directly or indirectly, by such person or persons; and, to assist the Commission in determining the facts as to the control of each person named above, each such person is directed to present specific information and data at said hearing showing: (1) The form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (2) the articles of incorporation, partnership, agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists or operates, as originally created and as subsequently changed, modified, amended or otherwise altered; (3) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed or authorized to act for such person under any circumstances whatsoever; (4) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner or means by which such ownership or interest is accomplished and/or maintained; and (5) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission."

Said order further directs that a copy of the Report be served upon each person directed to appear at the hearing so ordered for March 3, 1937; a copy of said order of January 26, 1937 is hereto annexed, marked "Exhibit D" and made a part hereof.

31 Fifteenth. The order, Exhibit D, contains at the foot thereof a notice that the matters assigned for hearing thereunder will be heard by this Commission sitting jointly with the Pennsylvania Commission. Immediately following the making of said order, Ex-

hibit D, this Commission, in its official Press Release No. 163, dated January 27, 1937, stated that the hearing directed to be held by the Commission's order, Exhibit D, is the result of requests by the Governor of Pennsylvania and the Pennsylvania Commission for assistance in procuring records which the Pennsylvania Commission lacks authority to obtain except through the exercise of the Federal jurisdiction, which jurisdiction the Pennsylvania Commission obviously does not possess. A copy of said Press Release No. 163 is hereto annexed, marked "Exhibit E," and made a part hereof.

Sixteenth. On or about the 28th day of January 1937 each of the petitioners received by mail from the Commission a copy of the order, Exhibit D, and a copy of the Report.

Seventeenth. On or about January 29, 1937, the petitioners Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, received by mail notices, dated January 28, 1937, from the Pennsylvania Commission. Said notices were entitled:

"The Public Service Commission of the Commonwealth of Pennsylvania v. C. 10985–10986—Pennsylvania Electric Company; C. 10987–10988—Northern Pennsylvania Power Company;
32 C. 10989–10990—Erie Lighting Company; C. 10991–10992—Solar Electric Company: C. 10993–10994—Clarion River Power Company; C. 10995–10996—Penelec Water Company; C. 10997–10998—Johnstown Fuel Supply Company; C. 10999–11000—Reading Coach Company; C. 11001–11002—Reading Street Railway Company."

Said notices are in words and figures as follows:

"Notice is hereby given that The Public Service Commission of the Commonwealth of Pennsylvania has scheduled the above entitled inquiries and investigations into the practices of the operating companies of the Associated Gas and Electric System in Pennsylvania, for further hearings in the hearing room of the Federal Power Commission on the Eighth Floor of the Carpenter Building at 10th and Case Streets NW., Washington, D. C., at 10 o'clock A. M. on March 3, 1937."

On or about the 4th day of February 1937, petitioner Metropolitan Edison Company received by mail a notice in words and figures identical to the quotation above set forth, and bearing docket numbers C. 10891–10892, 10893–10894, and 10897.

Eighteenth. The time and place designated in said notices for the hearing by the Pennsylvania Commission is the same time and place designated for the hearings ordered to be held by this Commission's order, Exhibit D. It thus appears by the aforesaid notice that the Pennsylvania Commission proposes to go forward with the aforesaid hearings before it at the hearing designated in the order of this Commission, Exhibit D, as a joint hearing. Such proceedings are so proposed despite the fact that the Pennsylvania Commission has no power or authority to act as such outside the territorial boundaries of the Commonwealth of Pennsylvania. Despite the fact

33 that the Commission has commenced no proceedings against Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company, four of the persons against whom are pending the proceedings instituted by the Pennsylvania Commission, these four persons have also been notified by the Pennsylvania Commission of the proposed hearing in said proceeding in Washington, D. C., on March 3, 1937. Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company are Pennsylvania corporations, respectively engaged in the businesses of furnishing water services, gas and transportation services. None of said persons is engaged in the transmission or sale of electric energy in interstate commerce or otherwise. None of said persons owns or operates facilities for such transmission or sale of electric energy. This Commission is wholly without jurisdiction of said persons.

Nineteenth. Said order, Exhibit D, is in excess of the powers of the Commission under the Federal Power Act and is made in pursuance and as a part of an investigation, to wit, this proceeding, which is beyond the powers and duties of the Commission.

Twentieth. The Commission has not been vested by the Federal Power Act, or otherwise, with jurisdiction or power to determine the propriety of contracts or working arrangements between public utilities and others, or the reasonableness of charges thereunder. The jurisdiction of the Commission under Part I of the Federal Power Act is limited to persons licensed thereunder, and under Parts II and III of the Federal Power Act is limited to facilities used in connection with the transmission or sale of electric energy in interstate commerce. No complaint whatever has been filed with the Commission with respect to any contracts or working arrangements
34 between petitioners and other persons insofar as they may affect licensees or facilities, if any, of petitioners under the jurisdiction of the Commission. Nevertheless, the Commission now seeks to support its investigation, as appears by the Report, on the basis, firstly, that it is an investigation to determine whether contracts and working arrangements between petitioners and other persons, and the charges thereunder, are proper and reasonable.

Twenty-first. The Federal Power Act contains no provision requiring that services rendered to public utilities be rendered at cost, and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by public utilities for services rendered to them exceed the cost thereof. Nevertheless, the Commission now seeks to support its investigation, as appears by the Report, on the basis, secondly, that it is an investigation as to whether the charges paid by petitioners to other persons exceed the cost to such other persons of rendering such services. The Commission is so proceeding with said investigation despite the fact that it relates to matters, as aforesaid, wholly without the jurisdiction of the Commission.

Twenty-second. The Commission now seeks to support its investigation, as appears by the Report, on the basis, thirdly, that it is an

investigation to determine whether contracts and working arrangements between petitioners and others violate the Federal Power Act, as amended, or any rule or regulation of the Commission issued pursuant to the authority of such Act. The Commission is so proceeding despite the fact that the Federal Power Act contains no provision giving the Commission any jurisdiction or power so to investigate. The Commission is so proceeding despite the fact that the Federal Power Act contains no provisions whatever prescribing any standards of propriety for such contracts, working
35 arrangements, and practices. The Commission is so proceeding despite the fact that there are no rules or regulations whatever issued by the Commission pursuant to the authority of the Federal Power Act, or otherwise, containing any provisions prescribing standards of propriety for such contracts, working arrangements, practices, and charges.

Twenty-third. The Commission now seeks to support its investigation, as appears by the Report, on the basis, fourthly, that it is an investigation to determine whether certain contracts and working arrangements between petitioners and other persons, and the charges made thereunder, warrant the adoption of rules or the issuance of orders by the Commission relating to such contracts, working arrangements, practices, and charges. The Commission is so proceeding, despite the fact that the Commission has no jurisdiction or power to adopt rules or to issue orders relating to such contracts, working arrangements, practices, or charges, in the absence of express statutory provision relating thereto in the Federal Power Act, or otherwise, and despite the fact that neither the Federal Power Act nor any other statute contains any such provisions.

Twenty-fourth. In fact, the bases now sought to be used to support such investigation are not only beyond the jurisdiction of the Commission, as aforesaid, but in reality the Commission has already proceeded with and is now prosecuting the same, for the sole purpose of obtaining information relating to the local and intrastate affairs of petitioners and other persons in order to obtain such information for the assistance of the Pennsylvania Commission in said proceedings for the imposition of penalties under the laws of the Commonwealth of Pennsylvania against petitioners, and
36 for the investigation of local and intrastate affairs of said petitioners. The Commission is so proceeding despite the fact that it has no jurisdiction or power under the Federal Power Act, or otherwise, to conduct such an investigation on any of the bases on which it now seeks to support the same; or for the actual purpose for which said investigation is being prosecuted.

Twenty-fifth. The Commission has not at any time or in anywise claimed or charged that petitioners are violating or are about to violate any law of the United States, the duty of the enforcement of which is imposed on the Commission, and, on information and belief, no complaint has ever been filed with the Commission charging any such violation. The Commission in this proceeding does not

purport to investigate facilities used in the transmission or sale of electric energy in interstate commerce. The Commission has no jurisdiction over the petitioners, in the premises, under the provisions of Parts II and III of the Federal Power Act, the only Act of Congress under which the Commission derives any power whatever. Nevertheless, the investigation now being carried on by the Commission and compliance by petitioners with the order, Exhibit D, require of petitioners the disclosure of matters, papers, and effects, the privacy of which is under the protection guaranteed to petitioners by Amendment IV to the Constitution of the United States.

Twenty-sixth. Compliance with the order, Exhibit D, will cause petitioners irreparable injury and damage, and will deprive them of their constitutional rights and will require them to render forced assistance to this Commission in carrying on a general inquisitorial investigation and fishing expedition into subject matters of which this Commission has no jurisdiction, where the only possible
37 purpose of such general inquisition and fishing expedition is the hope that matters might be produced which might be susceptible of use by the Pennsylvania Commission in such manner as to injure and discredit the petitioners.

Twenty-seventh. The enforcement of the order, Exhibit D, will require petitioners and their representatives to appear in Washington, D. C., on March 3, 1937, and then and there to produce the books, papers, and effects directed to be produced by the order, Exhibit D, and petitioners will thereby be deprived of their property and liberty without due process of law, in contravention of Amendment V to the Constitution of the United States.

Twenty-eighth. The Commission, in making and continuing its investigation pursuant to its order, Exhibit B, and in making its order, Exhibit D, is not only proceeding beyond the jurisdiction and powers conferred upon it by the Federal Power Act, but is proceeding with an investigation into affairs and matters of and between petitioners and others, which affairs are not subject to the control or jurisdiction of the Congress of the United States or of its subordinate agencies, as such control and jurisdiction are granted under Article I, Section 8, of, and limited by Amendment X to, the Constitution of the United States, in that said affairs do not affect commerce with foreign nations or among the several states of the United States, or with the Indian Tribes, but such affairs and matters of and between petitioners and others are expressly placed outside the control or jurisdiction of the Congress of the United States or of its subordinate agencies, by the terms of Amendment X to the Constitution of the United States. Said investigation and the orders of the Commission, Exhibits B and D, made in connection therewith are null and void, and said investigation and said orders are, and any attempted enforce-
38 ment of said orders would be, in violation of Article I, Section 8, of, and Amendment X to, the Constitution of the United States.

Twenty-ninth. The Commission in making and continuing to make its investigation pursuant to its order, Exhibit B, and in making its order, Exhibit D, and directing the same to petitioners, is assuming a jurisdiction over matters not embraced by the Federal Power Act, and its action in so doing is arbitrary, unreasonable, and capricious.

Thirtieth. If the Federal Power Act, directly or by construction, purports to give the jurisdiction now attempted to be exercised by the Commission, as herein described, then said Act is in violation of Amendment X to the Constitution of the United States. The attempted exercise of such powers is not only without authority of law but is further a violation of Amendment X to the Constitution of the United States.

Wherefore, for the reasons hereinabove set forth, your petitioners respectfully pray:

(a) that your Honorable Commission grant a rehearing in this proceeding;

(b) that upon such rehearing, your Honorable Commission enter an order vacating, setting aside, and annulling the order of the Commission dated January 26, 1937, Exhibit D, and terminating the proceeding purported to be instituted by the order of this Commission dated January 6, 1936, Exhibit B;

39 (c) that pending the disposition of this petition, all further proceedings herein be stayed and suspended.

METROPOLITAN EDISON COMPANY,
By RALPH D. JENNISON, *President.*
NORTHERN PENNSYLVANIA POWER COMPANY,
By RALPH D. JENNISON, *President.*
PENNSYLVANIA ELECTRIC COMPANY,
By RALPH D. JENNISON, *President.*
ERIE LIGHTING COMPANY,
By RALPH D. JENNISON, *President.*
THE CLARION RIVER POWER COMPANY,
By P. J. MORRISSEY, *Vice-President.*
SOLAR ELECTRIC COMPANY,
By C. W. WINEMAN, *Vice-President.*

40 [*Duly sworn to by Ralph D. Jennison et al.; jurats omitted in printing.*]

42 *Exhibit A to petition for rehearing*

Federal Power Commission, immediate release—Federal Power Act, release No. 20.

WASHINGTON, D. C., *November 26, 1935.*

Acting on the request of Governor George H. Earle and the Public Service Commission of Pennsylvania, the Federal Power Commission through Chairman Frank R. McNinch anounced today full cooperation under the Federal Power Act of 1935, in obtaining certain information sought by the Pennsylvania Commission from the Asso-

ciated Gas and Electric System in connection with an investigation of service and other charges by the Associated against its nine affiliated operating companies in that State.

The Federal Power Commission directed its General Counsel, Oswald Ryan, to go to Harrisburg for a conference with the Governor and the Pennsylvania Commission on procedure in the matter.

The Pennsylvania Commission last week opened its investigation of service and other charges by the Associated against the operating companies affiliated with it in that State. Governor Earle informed the Power Commission that counsel for the Associated said he could not give any assurance that an inspection of the Associated System's books outside of the State of Pennsylvania would be permitted.

43 *Exhibit B to petition for rehearing*

(Order of January 6, 1936)

Federal Power Commission—Frank R. McNinch (chairman), Basil Manly (vice chairman), Herbert J. Drane, Claude L. Draper, Clyde L. Seavey, Commissioners.

Order of inquiry and investigation of Metropolitan Edison Co. et al.

(IT 5015)

The following order was adopted:

It appearing to the Commission:

(1) That the Governor and the Public Service Commission of the Commonwealth of Pennsylvania have represented to the Federal Power Commission that in an inquiry now being prosecuted by said Public Service Commission, facts have been developed which show that Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, hereinafter called respondents, have certain contracts and working arrangements with persons who control, directly or indirectly, said respondents, or who are controlled by such persons; that said contracts and working arrangements are unjust and unreasonable and injuriously affect the rates and service of said respondents; that

44 certain of the books, accounts, records, and memoranda of such persons relating to said transactions are located outside the Commonwealth of Pennsylvania, some of said books, accounts, records, and memoranda having been removed from the Commonwealth of Pennsylvania during the course of said inquiry; and that full and complete inquiry into said transactions cannot be made without an examination of the books, accounts, records, and memoranda of such persons relating thereto;

(2) That full and complete information concerning said contracts and working arrangements and all expenditures and obligations incurred thereunder is necessary to enable the Federal Power Commis-

sion to determine whether, with respect to said matters, said respondents or any other persons are violating any provisions of the Federal Power Act or any rule, regulation, or order thereunder; to determine the effect of said contracts and working arrangements upon the cost of production and transmission of electric energy by means of facilities under the jurisdiction of the Commission; to aid said Commission in the enforcement of the regulatory and other provisions of the Federal Power Act in the performance of its duties and functions under said Act and in prescribing rules and regulations thereunder.

Now, therefore, it is ordered:

(a) That an investigation be and the same is hereby instituted to determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly or indirectly, said respondents or who is controlled by any such person and all expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them;

45 (b) That said respondents file with the Federal Power Commission on or before February 1, 1936, (1) copies of all such contracts and full and complete statements of all such working arrangements with all such persons; (2) full and complete statements of all charges appearing on the books of said respondents for the years 1934 and 1935 representing payments made and obligations incurred by said respondents to any such persons together with the full name and address of the person with whom said charge first originated and the cost to such person of rendering the service for which said charge was made, and an explanation of the nature of the service performed and by whom performed;

(c) That all books, accounts, memoranda, records, and correspondence of the respondents and of any person who controls, directly or indirectly, said respondents and any other person controlled by such person, or any of them, in so far as they relate to said transactions with or the business of said respondents, upon demand, shall be made available for examination by this Commission's representatives;

(d) That a copy of this order be served by registered mail upon each of said respondents.

46 *Exhibit C to petition for rehearing*

For publication, immediate release—Federal Power Commission, release No. 30.

Federal Power Commission Orders an investigation of contracts, etc., of six Pennsylvania power companies

WASHINGTON, D. C., *January 6, 1936.*

The Federal Power Commission today entered an order of inquiry and investigation in connection with certain accounts and practices,

including charges assessed against them, of six public utility electric operating companies in Pennsylvania. The six companies, all of which are affiliates or subsidiaries of the Associated Gas and Electric System, are as follows: Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, Clarion River Power Company, Solar Electric Company.

The text of the order is attached.

The Federal Commission has advised the Pennsylvania authorities that at the appropriate time the joint hearing in connection with the investigation will be held with the Public Service Commission of Pennsylvania.

47 *Exhibit D to Petition for Rehearing*

(Order of January 26, 1937)

Federal Power Commission—Frank R. McNinch (chairman), Basil Manly (vice chairman), Herbert J. Drane, Claude L. Draper, Clyde L. Seavey, Commissioners.

Order and Notice of Hearing In Re Metropolitan Edison Co. et al.

(IT 5015)

The Commission adopted the following order and notice:

It appearing to the Commission:

(1) That in response to the Commission's Order of Inquiry and investigation entered in the above matter on January 6, 1936, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, hereinafter referred to as respondents, reported charges appearing on the books of said companies for the years 1934 and 1935, representing payments made and obligations incurred to the following persons, viz, (a) "conceded affiliates." The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing & Supply Corporation, Public Utilities Appliance Corporation, Employees Welfare Association, Inc., Utilities Employees Securities
48 Company, Utility Clearing Corporation, The Associated Corporation, Associated Gas & Electric Company, Associated Gas & Electric Securities Company, Inc. (Del.), Associated Real Properties, Inc., General Gas & Electric Corporation, and (b) "not conceded affiliates," Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, H. C. Hopson & Company, Edward J. Cheney, Utility and Financial Advertising Agency, and C. M. M. Corporation.

(2) That examination of books and records of respondents and the following admitted affiliates of respondents, viz, Utility Clear-

ing Corporation, The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing and Supply Corporation, Public Utilities Appliance Corporation and Utilities Employees Securities Company, as well as the examination of certain records of Employees Welfare Association, Inc., disclosed business transactions, during the years 1934 and 1935, between respondents and the following additional persons, viz, H. C. Hopson, Edmund B. Naylon, Corporate Records and Secretarial Assistants, Day & Co., Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Corporation, NYPANJ Utililties Company, Metropolitan Edison Corporation, Associated Electric Company, Central U. S. Utilities Company, Pennsylvania Electric Corporation, and J. I. Mange.

(3) That accounting representatives of the Commission have prepared and submitted a report setting forth the results of its examination and investigation into certain charges reflected on the books of respondents which presents facts indicating that, Associated Gas & Electric Properties, Associated Securities Cor-
49 poration, Associated Gas & Electric Company, Associated Gas & Electric Corporation, Metropolitan Edison Corporation, NYPANJ Utilities Company, Associated Electric Company, Pennsylvania Electric Corporation, Central U. S. Utilities Company, J. I. Mange, Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, Corporate Records and Secretarial Assistants, H. C. Hopson, H. C. Hopson & Company, Edward J. Cheney, Utility and Financial Advertising Agency, C. M. M. Corporation, Day & Company, Edmund B. Naylon, are persons which control respondents, or are controlled by the same persons which control respondents.

Now, therefore, it is ordered:

(a) That a hearing be held at 10:00 A. M., on March 3, 1937, in the Commission's hearing room in Washington, D. C., by the Federal Power Commission or such representative as the Commission may hereinafter designate for such purpose, to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly, or indirectly, said respondents or who is controlled by any such person, and all
50 expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them;

(b) That the following persons (including respondents), viz: Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, Solar Electric Company, Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Company, Associated Gas & Electric Cor-

poration, Metropolitan Edison Corporation, NYPANJ Utilities Company, Associated Electric Company, Pennsylvania Electric Corporation, Central U. S. Utilities Company, The Associated Corporation, Associated Gas & Electric Securities Co. Inc. (Del.), Associated Real Properties, Inc., General Gas & Electric Corporation, Utility Clearing Corporation, The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing & Supply Corporation, Utilities Employees Securities Company, Public Utilities Appliance Corporation, Employees Welfare Association, Inc., Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, Corporate Records and Secretarial Assistants, J. I. Mange, H. C. Hopson, H. C. Hopson & Company,
51 Edward J. Cheney, Utility and Financial Advertising Agency, C. M. M. Corporation, Day & Company, Edmund B. Naylon, be and they are hereby directed to appear on March 3, 1937, and present for the record at such hearing, for the years 1934, 1935, and to date, full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them and any of the persons named above controlled, directly or indirectly, by such person or persons; and, to assist the Commission in determining the facts as to the control of each person named above, each such person is directed to present specific information and data at said hearing showing: (1) the form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (2) the articles of incorporation, partnership agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists, or operates, as originally created and as subsequently changed, modified, amended, or otherwise altered; (3) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed, or authorized to act for such person under any circumstance whatsoever; (4) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner or means by which such ownership or interest is accomplished and/or maintained; and (5) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission.

52 (c) That a copy of the report, as prepared by the accounting representatives of the Commission and setting forth the results of their investigation and examination into certain charges reflected on the books of respondents, be served on each person named in paragraph (b) of this order.

Notice.—The matters assigned for hearing under the foregoing order will be heard by the Federal Power Commission sitting jointly with The Public Service Commission of the Commonwealth of Pennsylvania.

53 *Exhibit E to petition for rehearing*

For publication, immediate release.—Federal Power Commission, release No. 163.

Federal Power Commission sets March 3 for joint hearing with Pennsylvania Commission to investigate control of numerous servicing companies of Associated Gas & Electric System

WASHINGTON, D. C., *January 27, 1937.*

The Federal Power Commission, sitting jointly with the Pennsylvania Public Service Commission, will hold a hearing on March 3, 1937, at its hearing room in Washington, D. C., "to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control" of the numerous servicing companies in the Associated Gas and Electric System.

This hearing, the first in which the Federal Power Commission has exercised the authority given it by the Federal Power Act of 1935, to hold joint hearings with State commissions on matters of mutual interest, is the result, Chairman Frank R. McNinch stated, of requests by the Governor of Pennsylvania and the Pennsylvania Public Service Commission for assistance in procuring records of Associated Gas & Electric Companies which the Pennsylvania Commission lacked authority to obtain except through exercise of the Federal jurisdiction.

Investigation will also be made of all contracts and working arrangements with such companies and all expenditures and obligations made or incurred by the several operating companies of the Associated System in the Commonwealth of Pennsylvania, to these servicing companies.

Investigation was begun in January 1936, and related to
54 charges reflected on the books of six operating companies of the Associated Gas & Electric System, situated in the State of Pennsylvania, namely: Metropolitan Edison Co., Northern Pennsylvania Power Co., Pennsylvania Electric Co., Erie Lighting Co., The Clarion River Power Co., and Solar Electric Co. They were directed to furnish copies of all contracts and working agreements between these companies and any person who controlled them directly or indirectly, or was controlled by such person; to furnish full and complete statements of all charges on the books of the companies for 1934 and 1935 representing payments made or obligations incurred by the companies to any persons who controlled the companies "or were controlled by the same persons who controlled respondents."

In making returns under the Commission's order, the companies separated charges appearing on their books into two classes: (1) charges made by companies conceded to be affiliates of respondents, and (2) companies not conceded to be affiliates.

Companies not conceded to be affiliates were: Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, H. C. Hopson & Company, Edward J. Cheney, Utility and

Financial Advertising Agency, C. M. M. Corporation, Day & Company.

Accounting representatives of the Commission assigned to the field investigation have reported that they were denied access to the books of the companies not conceded to be affiliates, as well as the books and records of Employees' Welfare Association, Inc., a conceded affiliate. This action on the part of the so-called nonaffiliated servicing companies of the Associated System has necessitated the hearing called for March 3, 1937, to determine whether these companies are in fact "controlled by the same persons who control respondents."

55 *Exhibit B to petition*

Before the Federal Power Commission

IN RE: METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, SOLAR ELECTRIC COMPANY

(No. IT–5015)

Petition of respondents for an adjudication in respect to the petition for a rehearing

Filed February 23, 1937

To the Federal Power Commission:

The petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and the Solar Electric Company respectfully represents:

1. That on the 23rd day of February 1937, your respondents filed with the Federal Power Commission a petition for a rehearing on an order of your Honorable Commission made and entered on January 26, 1937 (which ordered an inquiry and investigation into certain specified matters covered by said order of January 26, 1937, for March 3, 1937), praying (a) that your Honorable Com-
56 mission on such rehearing enter an order vacating the said order dated January 26, 1937, and terminating the proceeding purported to be instituted by the order of your Honorable Commission dated January 6, 1936; and (b) that all further proceedings be stayed pending the disposition of the petition.

2. That on the 24th day of February 1937, your Honorable Commission continued without day the hearing set for March 3, 1937 on said order of inquiry and investigation.

3. That on the 23rd day of March 1937, your Honorable Commission granted the petition of your respondents for a rehearing and fixed Wednesday, April 14, 1937, for a hearing on the said petition for a rehearing before the Honorable Frank A. Hampton, Esq., Examiner.

4. After your respondents had set forth the evidence which your respondents desired to submit in support of the petition for a rehearing, it became evident that the attorneys for your Honorable Commission intended to proceed with what the said attorneys conceive to be the investigation instituted by the order of January 6, 1936, in aid of which the order of January 26, 1937, was made, which said order of January 26, 1937, your respondents, by their petition for rehearing, had asked to be annulled and vacated, hearing on said order of investigation having, on February 24, 1937, been continued without day.

5. Your respondents, as soon as it had become evident to them that it was the intention of the attorneys for the Commission to proceed under the very orders the validity of which the respondents were questioning, made an application to your Honorable Examiner, as will appear from the notes of testimony, to certify to your Honorable Body the following request: "The respondents hereby
57 request the Federal Power Commission (1) to define the issues to be determined by the examiner on the respondents' petition for a rehearing; (2) to instruct its own attorneys that no evidence pursuant to the orders of January 6, 1936, and January 26, 1937, be introduced on the petition for a rehearing, and that no proceedings be taken pursuant to said orders until the question of the right of the Commission to make the orders be determined; (3) that the proceedings before the examiner be stayed pending this reference to the Commission and that counsel for the respondents be permitted to be heard by the Commission on this reference."

6. The examiner, as will appear by the notes of testimony, denied the respondents' motion to submit the request to your Honorable Commission.

7. The examiner, following the denial of the motion to submit respondents' requests to your Honorable Commission, rule (Rec. 120, et seq.):

"Examiner HAMPTON. First, as to the matter of the requested certification of the question to the Commission: The Examiner certified a question on the day before yesterday, because that was a question that was presented at the very threshold of the inquiry. Our rules of procedure do not provide for the certification of questions to the Commission for its immediate decision during a hearing before an examiner. There is no definite rule against it, however, and in as much as it was a question that was presented, as I have said, at the very threshold of the inquiry and before the beginning of the taking of testimony and because, further, it went to the very fundamental right of permitting respondents to see the formal record—to see the papers contained in the formal record of the case that was to be tried, I deemed it proper to grant the request and I did present the question to the Commission, recessing the hearing in the meantime; and then brought back the Commissioner's answer.

58 "But now, inasmuch as this inquiry is in the course of hearing and testimony has been taken and evidence adduced, the

Examiner conceives that from now following he will have to rule upon the questions that arise; and if counsel on either side are not content with his ruling they must take their exceptions which will hereafter be presented to the Commission and opportunity be allowed thereafter to those taking the exceptions to argue them before the Commission. That is the only method by which the rulings of the Examiner during the course of a trial may be appealed for review by the Commission under the rules and regulations that are in force here.

"I must, therefore, under the rules and regulations of the Commission deny the request of the motion—if it was a motion—to recess the hearing at this point in order to present this question to the Commission for immediate answer.

"That decision makes it necessary for the Examiner himself to rule upon the point that has been raised today by respondents' counsel.

"In considering this point the Examiner thinks we should bear in mind, first, that this is an investigational proceeding; it is a proceeding for the discovery of certain facts for the purposes as set out in the recital preliminary to the order and published and served with the order of January 6, 1936.

"What the Commission will do with facts ascertained and disclosed by an investigational proceeding such as this is for the Commission to determine after the facts and the results of the investigation are in hand.

"Now, following the order of January 6, 1936, respondents, with certain reservations made returns in response to that order, and those returns the Commission deemed not sufficiently full and complete to furnish the Commission with the information which it had issued the order of January 6, 1936, to procure.

"Therefore, on January 26, 1937, the Commission issued a
59 further order, and that order set a hearing to complete the procurement of the information which it was the purpose of the first order to obtain.

"Following the issuance of that order and the service upon the respondents, the respondents filed their petition for rehearing.

"Now, the Examiner considers that full faith and credit must be given to the basis of the order of January 6, 1936, as stated in the recital therein preliminary to the order proper.

"The petition for rehearing which has been filed, as has been stated by the solicitor for the Commission raises jurisdictional question of two characters: *It* (It) raises the question of the jurisdiction of the parties; and then it raises the question of jurisdiction of the subject matter of the investigation. It makes numerous allegations of facts in support of its contentions with respect to lack of jurisdiction of parties and subject matter.

"It raises the question, for instance, whether this proceeding was instituted touching the respondents for the purpose of supplying

information to the Pennsylvania Commission and alleges that the subject matter relates solely to local and intrastate affairs of the petitioners.

"It raises a question as to whether certain respondents are engaged in business wholly within the Commonwealth of Pennsylvania and alleges that they neither own nor operate facilities for the interstate transmission of electric energy. It alleges one of the purposes of the investigation is that this Commission desires to furnish facts to the Pennsylvania Commission so that that Commission may impose certain penalties upon certain of the parties. It raises certain factual questions with reference to the employment and report of the Commission's field accountants who made an accounting report to the Commission following the response of the petitioners to the first order.

"It raises the question and alleges that compliance with the
60 order of the Commission would cause the petitioners irreparable injury and damage in addition to depriving them of their constitutional rights.

"It charges this Commission with engaging in a 'fishing expedition' and to that extent questions the integrity of the purposes of this Commission in instituting this proceeding.

"It alleges that none of the affairs of the respondents affect commerce with foreign nations or among the several States of the United States or with the Indian tribes.

"It alleges that the Commission has no jurisdictional power to adopt rules or orders relating to contracts and working arrangements between petitioners, one of whom is the Commission's licensee and some of whom are admittedly public utilities under the Federal Power Act, and other persons.

"Now, as to the questions of fact, most of which relate to the jurisdictional questions, the Examiner does not forget that this investigation was instituted not by the order of January 26, 1937, but by the order of January 6, 1936. Therein the purpose of the investigation is stated. The order of January 26, 1937, was in aid of the order of January 6, 1936; and the petition filed by the petitioners—the respondents in the inquiry first instituted—asks that both orders and the proceedings under them be vacated. It brings into this hearing, it seems to the Examiner, in order to determine the jurisdiction of the Commission, practically the full scope of the facts called for in the first order.

"In other words, this petition, it seems to the Examiner, searches the whole record. Certainly it is necessary that the affairs of the respondents be gone into in this investigation, in order to enable the Examiner, first, and the Commission on review of the Examiner's report, the record and the exceptions and arguments, to determine the question of jurisdiction as to the parties.

"The Examiner recognizes also this fact: That this is not the
61 trial of a case in a United States District Court or other court. This is an administrative hearing.

"The fundamental question here, as the Examiner sees it, is whether or not this Commission has the power to make the investigation. That is the question raised by the petition for rehearing; and in order to determine that question, the Commission must use the power given it by the statute, and respecting its possession of this power the Examiner has no doubt, to determine which of these respondents are public utilities; to determine the state of facts as to the charges they pay and enter on their books for services rendered by affiliates, to determine their affiliation with each other and the companies charging them for services, and to investigate the facts touching the allegations of fact contained in the petition for rehearing which is now before us.

"It seems impossible to separate the questions raised by the petition from the questions involved in the Commission's orders of January 6, 1936, and January 26, 1937.

"We are not required in this administrative proceeding, as the Examiner stated two days ago in ruling in favor of the respondents on another matter relating to the admissibility of certain evidence we are not required to adhere strictly to the common law rules of evidence, or even to the more relaxed statutory rules of evidence that obtain in some of the courts of the land. The power of investigation necessarily must be exercised in a way involving broad discretion and latitude in order to effect its purpose. The purpose of an investigation is to discover, and it is sometimes necessary to discover hidden things. It is not the trial of one definite issue standing alone that is involved here; it is the discovery of all the facts necessary to be passed upon in order to determine the question of jurisdiction.

"The Examiner has no idea of confirming the introduction of
62 testimony in this case to that which would be admitted in a court of common law.

"The facts necessary to discover and which the Commission wishes to discover can hurt no honest person or purpose and they are facts peculiarly within the knowledge of the respondents. The testimony that has been proffered here and introduced here by the Commission's counsel is testimony relating to affairs and matters much of which is reflected on the books of the respondents themselves, which books are of course in the possession of the respondents.

"Three of the respondents are admittedly public utilities and one is a licensee of the Commission. Their business is a business affected with a public use, in which the public interest is important, which public interest this Commission is charged with the duty of protecting.

"The Examiner will state now that, considering the searching nature of the petition that has been filed here, its factual allegations, and the other facts that he has recited, he expects to rule and does rule that Commission's counsel here may introduce evidence touching matters appearing on the books of the respondent corporations, evidence relating to the affiliation of the respondent public utilities with other electric utilities and with companies whose

charges appear on the books of the public utility respondents in this proceeding, and with relation to such charges; as well as to the business operation, contracts and records of respondents is (if) that will aid in determining the jurisdictional questions here raised. That is the ruling of the Examiner." [Parenthetical insertion ours.]

8. On the request of the petitioners an exception to the Examiner's ruling was allowed and the respondents requested that the said ruling be certified to your Honorable Commission for review.

63 9. Your Honorable Examiner refused to certify his ruling to your Honorable body but granted to your respondents an exception to his ruling.

10. Your respondents aver that under the Act of Congress creating the Federal Power Commission, any order made by your Honorable Commission in any proceeding under the Act is subject to judicial review in accordance with the terms of the said Act, but that before an appeal can be taken in accordance with the terms of the said Act, from any order made in any such proceeding, a petition for a rehearing must be filed setting forth the objections to the said order.

11. Your respondents aver that for the purpose of perfecting their right to an appeal from the order of your Honorable Commission dated January 26, 1937, which respondents believe was beyond the jurisdiction of the Commission, your respondents filed a petition for a rehearing, which petition for a rehearing your Honorable Commission set forth a hearing before the Honorable Frank A. Hampton, as hereinbefore set forth.

12. Your respondents aver, that if the attorneys for your Honorable Commission and the Examiner are permitted to proceed as they have indicated they intend to proceed, your respondents are being denied their right of appeal and their right to have the said order dated January 26, 1937, judicially reviewed as provided for in the Federal Power Act and your respondents are being put to great expense and inconveience in the conduct of a long investigation, which said investigation would be useless, if the respondents' contentions as to the power of your Honorable Commission to make the order complained of are sustained.

Your respondents therefore pray your Honorable Commission, in the alternative:

64 1. If your Honorable Commission has determined to affirm its right to make the order of January 26, 1937, that your Honorable Commission enter an order to that effect so that your respondents may proceed to a judicial review of the right of your Honorable Commission to make the said order.

2. If, however, your Honorable Commission has not so determined to sustain the said order of January 26, 1937, that you instruct your Honorable Examiner to confine the testimony in the rehearing now pending to matters raised by the petition for rehearing, to wit: the jurisdiction of the Commission over the respondents and the power and authority of the Commission to make the said order of January

26, 1937, and that, pending action on the prayer of your petitioners for a vacation of the order of the Commission, dated January 26, 1937, any proceedings directed towards an investigation or discovery with respect to the matters set forth in said order (hearing on which investigation was postponed by this Commission without day) be stayed.

Respondents respectfully suggest to your Honorable Commission that it is inconceivable to respondents that your Honorable Commission could have intended to enter into the very investigation, the right to make which was questioned, under the guise of granting a petition for rehearing, the sole purpose of which was clearly to raise the question of the legality of the order of January 26, 1937, the right of the Commission to make the investigation proposed thereby, and the jurisdiction of your Commission over the persons of some of your respondents, after continuing without day the hearing set for making such investigation, which continuance, it is submitted, respondents had a right to assume was granted in compliance
65 with its request for a suspension of all further proceedings in pursuance of said order, pending the disposition of the petition for rehearing.

And your petitioners will ever pray.

WALTER BIDDLE SAUL,
Attorney for Respondents.

[*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

66 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Stipulation re paragraph (b) of order of Commission

Filed April 27, 1937

To avoid the chance of misunderstanding and to give adequate assurance to this court that none of the persons named in paragraph (b) of the order of the Federal Power Commission dated January 26, 1937 (petition, pp. 50–51) are now under compulsion to respond thereto, the Solicitor for the Federal Power Commission hereby stipulates that the Federal Power Commission construes the granting of the petition for rehearing as relieving all persons named in said paragraph (b) of said order from responding thereto and that no effort has been made or will be made to enforce paragraph (b) of said order.

DOZIER A. DEVANE,
Solicitor for Federal Power Commission.

[File endorsement omitted.]

67 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Motion to dismiss petition for rule to show cause and for stay of proceedings

Filed May 10, 1937

Comes now the Federal Power Commission by its duly authorized attorneys and moves this Court to dismiss the petition filed in this cause for the reasons that said petition does not state grounds upon which the writ prayed for may lawfully issue; that the relief prayed is not within the jurisdiction of this Court; and that petitioners have a full, adequate, and complete remedy at law.

OSWALD RYAN, *General Counsel*,
DOZIER A. DEVANE, *Solicitor*,
LAMBERT MCALLISTER, *Attorney*,
Attorneys for Federal Power Commission.

[File endorsement omitted.]

68 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order granting rule to show cause

Filed July 6, 1937

Upon consideration of the pleadings, briefs, and arguments of counsel in the above-entitled matter,

It is ordered that a rule is hereby granted upon the Federal Power Commission to show cause why an order should not be made as prayed for by petitioners, returnable Monday, October 4, 1937, at 10 a. m.

Philadelphia, July 6, 1937.

BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

69 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Notice

Filed Sept. 2, 1937

FEDERAL POWER COMMISSION,
Hurley-Wright Building, 1800 Pennsylvania Avenue NW.,
Washington, D. C.

Notice is hereby given that an application for a stay in the above entitled case restraining the Federal Power Commission from pro-

ceeding against petitioners with its hearing on September 14, 1937, will be made to the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pa., on the 7th day of September 1937, at 2 o'clock, P. M., Daylight Saving Time.

A copy of the application for said stay is herewith enclosed.

WALTER BIDDLE SAUL

70 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition for stay of proceedings

Filed Sept. 2, 1937

To the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit:

Your petitioners, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company and Solar Electric Company, respectfully aver:

1. On the 27th day of April 1937, your petitioners applied to your Honorable Court for a Rule upon the Federal Power Commission to show cause, inter alia, why the Federal Power Commission should not be enjoined and restrained from continuing with an inquiry and investigation against your petitioners until such time as your petitioners' petition to said Commission for a rehearing, questioning the jurisdiction and power of said Commission to conduct such inquiry and investigation, and to make its order dated January 27, 1937, under which said Commission purported to proceed, had been disposed of by the Commission and an opportunity afforded to your petitioners for a review of the action of the Federal Power Commission by your Honorable Court.

2. The petition was presented to your Honorable Court and orally argued on the 27th day of April 1937, and written briefs filed subsequent to said oral argument.

71 3. At the said oral argument, counsel for the Federal Power Commission stipulated that the Commission would suspend its proceedings if a Rule were issued, pending a hearing and determination on the return of the Rule. For this reason, in petitioners' reply brief dated April 30, 1937, petitioners did not press their application for a stay of proceedings.

4. In the second reply brief filed on behalf of the Commission on May 8, 1937, counsel for the Commission attempted to limit the stipulation which had been made at the hearing by inserting the following statement in the said supplemental reply brief:

"In accordance with this Stipulation the Federal Power Commission has recessed the hearings in the proceeding before it. However the Commission is unwilling to voluntarily suspend the hear-

ings beyond the time necessary to afford this court an opportunity to determine whether a Rule should issue."

The stipulation to which this above paragraph referred was according to the Commission's Supplemental Reply Brief of May 8, 1937, made in the following language:

"The Stipulation which counsel for the Commission made with the court is as follows:

"Pending consideration by this court whether a Rule should issue in this court the Federal Power Commission will suspend the hearings in the proceedings before it."

5. Your Honorable Court on July 6, 1937, entered the following order:

"Upon consideration of the pleadings, briefs and arguments of counsel in the above-entitled matter,

"It is ordered that a rule is hereby granted upon the Federal Power Commission to show cause why an order should not be made as prayed for by petitioners, returnable Monday, October 4, 1937, at 10 A. M.

"Philadelphia, July 6, 1937.

"BUFFINGTON, *Circuit Judge.*"

72 6. On or about August 25, 1937, the Federal Power Commission gave notice that it would resume public hearings notwithstanding the granting of the said Rule on September 14, 1937, the said notice being in the following form:

"Notice is hereby given that public hearing will be resumed in the above matter on September 14, 1937, at 10 A. M. in the hearing room of the Commission, Hurley-Wright Building, 1800 Pennsylvania Avenue NW., Washington, D. C.

"LEON M. FUQUAY, *Secretary.*"

7. The said notice was mailed not only to the petitioners but to the thirty-three persons, firms, and corporations whose names appear in the questioned Order of the Commission dated January 26, 1937.

8. Your petitioners aver that the right to proceed with the hearing which the Federal Power Commission has set for September 14, 1937, is the issue raised by the petition therein, and is the very matter which your Honorable Court has set for the hearing on Monday, October 4, 1937; and that if the Federal Power Commission is permitted to continue to proceed with the hearing on September 14, 1937, the Rule which your Honorable Court has heretofore granted after full argument will become moot and your petitioners will be deprived of their rights without recourse and the Appellate Jurisdiction of your Honorable Court provided for in the Act of Congress creating the Federal Power Commission will be destroyed and rendered of no avail by the precipitate action of the Federal Power Commission.

9. Your petitioners point out that the date of the last hearing before the Federal Power Commission was April 22, 1937; that since the issue of the rule to show cause herein on July 6, 1937,

73 no action was taken by the Federal Power Commission in furtherance of hearings on the petitioners' petition to said Commission for Rehearing until August 25, 1937, the date on which notice was given of the hearing to be held on September 14, 1937; that the date for such proposed hearing is only slightly more than two weeks prior to the return date of the rule to show cause issued by your Honorable Court, at which time the propriety of any further hearings on petitioners' petition for rehearing will be argued before your Honorable Court and presented to it for its determination; that manifestiy no urgency exists for the conduct of questioned hearings two weeks prior to the consideration by the Court of the propriety thereof; that while on the one hand, the petitioners will be irreparably deprived of their rights if the proposed hearing before the Commission is permitted to be held, on the other hand, the Federal Power Commission can in no wise be damaged or prejudiced in the proper conduct of its investigation by the stay or postponement of the proposed hearing until the decision of your Honorable Court upon the return of the rule to show cause herein.

10. Your petitioners therefore pray that your Honorable Court temporarily enjoin and stay all proceedings, including the proposed hearing on September 14, 1937, on the part of the Federal Power Commission in connection with its purported inquiry and investigation and upon the Petition for Rehearing filed with the said Commission, pending the hearing had upon the rule to show cause heretofore issued on July 6, 1937, and the determination by this Court of the prayers of the petition heretofore filed herein.

74 And your petitioners will ever pray, etc.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY,
Petitioners,

By WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAUL, EWING, REMICK & SAUL.
2301 Packard Building, Philadelphia, Pa.
TRAVIS, BROWNBACK & PAXSON.
61 Broadway, New York, N. Y.,
Attorneys for Petitioners.

75 [*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

[File endorsement omitted.]

76 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 7th day of September 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on petition for stay of proceedings, before the Honorable J. Warren Davis and Honorable John Biggs, Jr., Circuit Judges.

Whereupon the Court made the following order:

77 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Return on behalf of the Federal Power Commission to rule to show cause

Filed Sept. 21, 1937

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Comes now the Federal Power Commission and for return to the order to show cause, issued out of this Honorable Court on July 6, 1937 in the above-entitled matter, respectfully shows that:

1. The Federal Power Commission is a federal administrative agency created by Act of Congress and is charged with the duty of enforcing and administering the Federal Power Act. (41 Stat., 1063; 41 Stat., 1353; 46 Stat., 797; 49 Stat., 847; 16 U. S. C., 791a–825r.)

2. Title II of the Public Utility Act of 1935 (approved August 26, 1935, 49 Stat. 847–863) amended the Federal Water Power Act as amended (41 Stat. 1063–1077, 41 Stat. 1353, 46 Stat. 797), and conferred upon the Federal Power Commission new and extensive regulatory powers over public utilities as therein defined and over licensees subject to the jurisdiction of the Commission. Title II of the Public Utility Act of 1935 was by Section 320 thereof
78 given a short title "Federal Power Act," sometimes hereinafter referred to as the "Act." Part I of the Act relates to the jurisdiction and authority of the Federal Power Commission over the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States or, upon any part of the public lands and reservations

of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, and over persons receiving licenses from the Commission thereunder for the construction of licensed projects. Part II relates to the jurisdiction of the Commission over public utilities engaged in the transmission of electric energy in interstate commerce and in the sale at wholesale of electric energy in interstate commerce. Part III prescribes the administrative and procedural jurisdiction of the Commission, and the jurisdiction of the Courts relating to both licensees and public utilities.

3. The Act (Sections 206, 209, and 302) provides for the fullest cooperation between the Federal Power Commission and State regulatory commissions to the end that there may be full and complete regulation of public utilities in the public interest.

4. On August 31, 1935, the Federal Power Commission transmitted to members of all State regulatory commissions a copy of the
79 Public Utility Act of 1935, called attention to the cooperative provisions of Title II of the Act, and tendered to the State commissions fullest cooperation in the administration of Title II of said Act. Directly thereafter, the Public Service Commission of the Commonwealth of Pennsylvania and the Governor of said State informed the Federal Power Commission that, in an inquiry being prosecuted before said Public Service Commission of Pennsylvania, facts had been developed which showed that Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company had entered into certain contracts and working arrangements with persons who controlled them, directly or indirectly, or who were controlled by the same persons that controlled them, and that said contracts and working arrangements were unjust and unreasonable, and injuriously affected the rates and services of said companies, that certain of the books, accounts, records, and memoranda of such persons relating to said transactions were located outside the Commonwealth of Pennsylvania and beyond the jurisdiction of the Public Service Commission of Pennsylvania, and that full and complete inquiry into said transactions could not be made without an examination of these books, accounts, records, and memoranda, and the Federal Power Commission was requested to exercise its authority under the Federal Power Act to secure full and complete information concerning said contracts and working arrangements and all expenditures and obligations incurred thereunder, and to make available to the Public Service Commission of Pennsylvania, as authorized by the Act, such information secured as the result of said investigation as would be of assistance to said State commission in the regulation of said companies.

80 5. Acting pursuant to said request, the Federal Power Commission on January 6, 1936, upon its own motion, adopted an

order of inquiry and investigation against Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, who were therein named respondents. Said order required said respondents:

(a) To furnish to the Commission copies of all contracts, and full and complete statements of all working arrangements between said respondents and any person who controlled, directly or indirectly, said respondents or who was controlled by any such person;

(b) Full and complete statements of all charges appearing on the books of said respondents for the years 1934 and 1935 representing payments made and obligations incurred by respondents to any person who controlled respondents, directly or indirectly, or who were controlled by the same persons who controlled respondents;

(c) The full name and address of the person with whom the charge first originated and the cost to such person of rendering the services for which the charge was made as well as an explanation of the nature of the service performed and by whom performed.

81 A full and complete copy of the order of the Federal Power Commission under date of January 6, 1936 is attached hereto as Exhibit A and by reference made a part hereof.

6. In response to said order of inquiry and investigation, each of said respondents, saving and reserving unto themselves all rights of every kind to raise the question of legality and authority of the Federal Power Commission to make said order, and to raise the question of the constitutionality of the Act under which the Federal Power Commission purported to act, filed returns with the Commission showing contracts between each of them, and The Utility Management Corporation, E. M. Gilbert Engineering Corporation, and Utilities Purchasing & Supply Corporation, and each of said respondents except Solar Electric Company and The Clarion River Power Company reported contracts with Utility Accountants and Tax Consultants. Copies of all such contracts were filed with respondents' returns. Respondents also reported working arrangements between them and Employees' Welfare Association, Inc., Utility Clearing Corporation, Utilities Employees Securities Company, Transfer and Coupon Paying Agency, Financial and Securities Assistants, E. J. Cheney, and Utility and Financial Advertising Agency. A brief description of each of the above-named organizations and a statement of the services furnished was shown. Said respondents also made returns of the charges appearing on their books for the years 1934 and 1935 representing payments made or obligations incurred as called for by the Commission's order. Affiliation was denied, however, as to some of the companies to whom said payments were made. The following statements compiled from the returns of all respondents show the charges reported by the respondents in response to the Commission's order classified as they were in the returns between "companies conceded affiliates" and "companies not conceded affiliates."

	Metropolitan Edison Co.	Northern Penna. Power Co.	Penna. Electric Co.	Erie Lighting Co.	The Clarion River Power Co.	Solar Electric Co.	Total
Companies' conceded affiliates:							
The Utility Management Corporation	$264,326.95	$36,763.00	$198,631.69	$37,106.41	$553.03	$2,539.99	$539,921.07
E. M. Gilbert Engineering Corporation	54,876.69	22,127.89	18,221.88	4,560.45	665.90	335.22	100,788.03
Utilities Purchasing & Supply Corporation	17,212.42	1,306.74	7,869.10	2,634.17	68.67	12.84	29,103.94
Public Utilities Appliance Corporation	10,768.18		279.25				11,047.43
Employees Welfare Association, Inc.	119,229.60	9,984.70	74,038.20	17,402.61	1,058.56	431.04	222,144.71
Utilities Employees Securities Company	62,758.33	6,030.06	35,296.46	10,134.57	535.99	285.20	115,040.61
Utility Clearing Corporation	182,140.58	26,100.76	111,123.68	31,532.69	2,251.11	908.64	354,057.46
The Associated Corporation	255.23	14,000.00	150.00				14,405.23
Associated Gas & Electric Company			20.53				20.53
Associated Gas & Electric Securities Co., Inc. (Del.)			624.95				624.95
Associated Public Utilities Corporation							
Associated Real Properties, Inc.	165.00						165.00
General Gas & Electric Corporation	5,220.80	3,947.64					9,168.44
Metropolitan Edison Corporation							
Pennsylvania Electric Corporation							
Associated Gas & Electric System [1]							
Associated Gas & Electric Companies							
Associated Gas & Electric Securities [1]							
Companies' stock investing committee							
	716,953.78	120,260.79	446,255.74	103,370.90	5,133.26	4,512.93	1,396,487.40
Companies' not conceded affiliates:							
Utility Accountants and Tax Consultants	25,673.48	6,750.61	37,652.50	4,902.60	4,634.22	598.35	80,301.76
Transfer and Coupon Paying Agency	5,196.79	267.78	4,824.78		389.62		10,678.97
Financial & Securities Assistants	2,518.94	82.70	779.12		327.66		3,708.42
Daniel Starch & Staff							
E. J. Cheney	8,844.92	70,457.07	2,149.20	640.97	385.00	115.00	82,592.16
Utility and Financial Accountants, Inc.	500.00						500.00
Utility and Financial Advertising Agency	2,574.59	5,964.33	2,570.38	265.06			11,374.36
H. C. Hopson & Company	131.00	6.00					137.00
G. M. M. Corporation	4,631.36	2,211.00	1,998.11				8,840.47
Day & Company [2]							
	50,071.08	85,739.49	49,974.09	5,898.63	5,736.50	713.35	198,133.14
	767,024.86	206,000.28	496,229.83	109,269.53	10,869.76	5,226.28	1,594,620.54

[1] Not corporations.
[2] Nominee partnership for registration of securities.

	Metropolitan Edison Co.	Northern Penna. Power Co.	Penna. Electric Co.	Erie Lighting Co.	The Clarion River Power Co.	Solar Electric Co.	Total
Companies' conceded affiliates:							
The Utility Management Corporation	$279,286.98	$36,311.65	$207,785.63	$37,548.05	$270.78	$2,240.54	$563,443.63
E. M. Gilbert Engineering Corporation	100,529.38	26,916.80	30,276.97	3,446.67	1,386.42	325.55	162,881.79
Utilities Purchasing & Supply Corporation	26,407.99	2,313.42	9,439.42	3,151.44	90.33	6.14	41,408.74
Public Utilities Appliance Corporation	2,489.63						2,489.63
Employees Welfare Association, Inc.	122,673.60	10,955.11	74,758.81	17,547.08	1,120.19	431.04	227,485.83
Utilities Employees Securities Company	74,178.95	7,018.97	39,329.01	11,336.40	599.55	319.02	132,781.90
Utility Clearing Corporation	326,356.07	44,450.52	234,409.80	33,711.54	1,609.01	888.37	641,425.31
The Associated Corporation	346.52		213.56				560.08
Associated Gas & Electric Company							
Associated Gas & Electric Securities Co., Inc. (Del.)							
Associated Public Utilities Corporation							
Associated Real Properties, Inc.	180.00						180.00
General Gas & Electric Corporation	1,647.16	14,098.44					15,745.60
Metropolitan Edison Corporation							
Pennsylvania Electric Corporation							
Associated Gas & Electric System [1]							
Associated Gas & Electric Companies [1]							
Associated Gas & Electric Securities [1]							
Companies' stock investing committee							
	934,096.28	142,064.91	596,213.20	106,741.18	5,076.28	4,210.66	1,788,402.51
Companies' not conceded affiliates:							
Utility Accountants and Tax Consultants	54,552.70	10,587.37	40,362.04	4,577.58	1,636.60	607.68	112,323.97
Transfer and Coupon Paying Agency	7,594.80	382.38	5,132.24		470.25		13,579.67
Financial & Securities Assistants	5,604.94	505.19	1,068.75	64.40			7,243.28
Daniel Starch & Staff							
E. J. Cheney	26,389.19	7,086.22	22,417.72	2,263.28	20.00	55.00	58,231.41
Utility and Financial Accountants, Inc.							
Utility and Financial Advertising Agency	11,818.83	8,730.83	4,635.44	888.66			26,073.76
H. C. Hopson & Company							
C. M. M. Corporation							
Day & Company [1]							
	105,960.46	27,291.99	73,616.19	7,793.92	2,126.85	662.68	217,452.09
	1,040,056.74	169,356.90	669,829.39	114,535.10	7,203.13	4,873.34	2,005,854.60

[1] Not Corporations.
[2] Nominee partnership for registration of securities.

84 7. Under date of March 6, 1936, the Federal Power Commission adopted an order pursuant to the provisions of Section 209 (b) of the Federal Power Act accepting the offer of the Public Service Commission of the Commonwealth of Pennsylvania to make available the services of certain employees of its staff without compensation for the purpose of assisting in the inquiry instituted by its order of January 6, 1936. Said employees of the Public Service Commission of Pennsylvania qualified as examiners of the Federal Power Commission and assisted in the accounting work thereafter undertaken in the inquiry and investigation.

8. Subsequent to the filing of returns by respondents under the order of January 6, 1936, accounting representatives of the Commission made a field examination and investigation to determine the accuracy of the returns as made and to develop information and data called for by the order of January 6, 1936, which had not been furnished by respondents. This field investigation was directed to an examination of the books, records, and accounts, not only of respondents and admitted affiliates, but also of alleged non-affiliates, insofar as they related to charges shown in respondents' returns. Access to the books, records, and accounts of so-called non-affiliates was denied because of their claimed status as non-affiliates—although apparently, the same persons exercised dominion and control over the books, records, and accounts of alleged non-affiliates and admitted affiliates alike. The books, records, and accounts of the alleged non-affiliates were apparently kept and maintained by the same force of employees, in
85 the same offices as were the books, records, and accounts of some of the admitted affiliates. Without full disclosure as to the nature of the charges emanating from these alleged non-affiliates as well as the cost of the service rendered and the necessity therefor, the Commission's representatives were not able to determine the accuracy or correctness of the books, records, and accounts of respondents.

9. The examiners of the Commission on December 10, 1936, submitted to the Commission a report, signed by Examiners Harry L. Osman and J. A. Wilhelm, setting forth the results of their examination and reporting that access to the necessary books, records, and accounts of the alleged non-affiliates had been denied them.

10. The examiners of the Commission further reported that the examination of the books, accounts, memoranda, and records of the respondents, and of certain other persons, disclosed transactions during the years 1934 and 1935 between the said respondents and the following additional persons not theretofore reported by the respondents; viz, H. C. Hopson, Edmund B. Naylon, Corporate Records and Secretarial Assistants, Day & Company, Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Corporation, NYPANJ Utilities Company, Metropolitan Edison Company, Associated Electric Company, Central U. S. Utilities Company, Pennsylvania Electric Corporation, and J. I. Mange.

11. On January 26, 1937, the Federal Power Commission directed by interim order that a hearing be held on March 3, 1937, to ascertain and determine: (a) all facts, practices, and matters regarding the ownership, operation, management, and control of said respondents, or either of them; (b) all contracts and working arrangements between said respondents and any person who controls, di-
86 rectly or indirectly, said respondents or who is controlled by any such person; and (c) all expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them.

12. By paragraph (b) of said order of January 26, 1937, the Commission directed in the form of subpoena duces tecum, that respondents, as well as other persons named therein (being persons who originated or made charges which were, directly or indirectly, reflected upon the books of said respondents), appear at the hearing and present for the record (for the years 1934, 1935, and to date) full and complete information as to the person or persons which controlled, directly or indirectly, the respondents and each of them and any of the other persons named therein which were directly or indirectly, under the same control as respondents or either of them; and, to assist the Commission in determining the facts as to the control of each person named therein, each such person was directed to present specific information and data at said hearing showing: (a) the form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (b) the articles of incorporation, partnership agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists, or operates, as originally created and as subsequently changed, modified, amended, or otherwise altered; (c) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed, or authorized to act for such person under any circumstance whatsoever; (d) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner
87 or means by which such ownership or interest is accomplished and/or maintained; and (e) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission.

13. The order of January 26, 1937, also directed that a copy of the accounting report prepared by Harry L. Osman and J. A. Wilhelm, setting forth the results of their investigation and examination of charges reflected on the books of respondents be served upon respondents and all persons to whom the subpoena duces tecum was directed.

14. The order of January 26, 1937, further gave notice that the matters assigned for hearing would be heard by the Federal Power

Commission sitting jointly with the Public Service Commission of the Commonwealth of Pennsylvania.

A full and complete copy of the order of the Federal Power Commission, under date of January 26, 1937, is attached hereto as "Exhibit B" and by reference made a part hereof.

15. The interim order of January 26, 1937, assigning for hearing the matters therein specified, was duly served on respondents together with a copy of the accounting report submitted to the Commission by Messrs. Osman and Wilhelm.

16. Thereafter on February 23, 1937, petitioners filed with the Federal Power Commission their petition for rehearing. Said petition prayed the Commission to grant a rehearing upon its order of January 26, 1937, and, upon such rehearing, to vacate, set aside, and annul said order and terminate the proceeding instituted by its order of January 6, 1936.

88 17. By appropriate action, the Federal Power Commission on March 23, 1937, granted the petition for rehearing filed by respondents under date of February 23, 1937, and assigned for hearing on April 14, 1937, the matters involved in the proceeding. The minute of the meeting of the Federal Power Commission recording such action is attached hereto as Exhibit C.

18. The Acting Secretary of the Federal Power Commission on March 24, 1937, notified respondents of the action of the Commission in granting the petition for rehearing and assigning the matters involved in the proceeding for hearing on the 14th day of April 1937. The notice given by the Acting Secretary to respondents was as follows:

"Notice is hereby given that the Federal Power Commission, on March 23, 1937, granted the petition for rehearing filed in the above matter by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, and assigned the matters involved in this proceeding for hearing in the hearing room of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

"By the Commission:

"LEON M. FUQUAY, *Acting Secretary.*"

19. Thereafter, on April 14, 1937, in accordance with the above notice, the Commission before its duly appointed examiner began the hearing which had been set by its order of March 23, 1937. At this hearing the petitioners were afforded an opportunity to introduce testimony in support of their petition for rehearing. At the conclusion of the petitioners' evidence, counsel for the Commission began the introduction of testimony. Almost immediately the petitioners objected to certain evidence sought to be introduced by counsel for the Commission, on the grounds that such evidence

89 had no bearing on the issues raised by their petition for rehearing. The examiner overruled most of the petitioners' objections to the evidence offered by counsel for the Commission and allowed such evidence to be introduced, permitting petitioners to note exceptions to rulings of the examiner. Before the counsel for the Commission had completed the introduction of evidence, and before the Commission had an opportunity to offer all the evidence which they considered as having direct bearing upon the issues involved in the hearing petitioners applied to this court for a Rule to Show Cause and Stay of Proceedings.

20. The evidence which was offered by counsel for the Commission at the hearing which commenced on April 14, 1937, and which was objected to by petitioners and allowed by the examiner to be made part of the record was evidence to establish the jurisdiction of the Commission over the petitioners and over the subject matter of the hearing and no evidence was offered by counsel for the Commission which was not material to the establishment of the jurisdiction of this Commission in the premises.

21. All hearings, investigations, and proceedings before the Commission under the Federal Power Act are governed by rules of practice and procedure adopted by the Commission. The Commission has complete authority under the Act to direct the procedure before it from the very inception of any proceeding, and there is nothing in the rules of practice and procedure adopted by the Commission pursuant to the Act which gives any party to any proceeding before the Commission the right to an appeal from an interim order of the Commission or from a ruling of an examiner. There is nothing in the Federal Power Act, the Judicial Code, or in any other statute which would permit any such appeal to any court.

90 22. Every right which petitioners have asserted in this court, if valid, has an adequate and appropriate remedy readily available in a court of original jurisdiction.

Wherefore, the Federal Power Commission prays:

That the Rule to Show Cause issued out of this Court on July 6, 1937, be discharged, the restraining order granted September 7, 1937, be dissolved, and the petition filed herein forthwith dismissed.

FEDERAL POWER COMMISSION,
By CLYDE L. SEAVEY, *Vice Chairman.*

OSWALD RYAN, *General Counsel,*
DOZIER A. DEVANE, *Solicitor,*
LAMBERT MCALLISTER, *Attorney,*
Attorneys for Federal Power Commission.

91 [*Duly sworn to by Clyde L. Seavey; jurat omitted in printing.*]

92 [Exhibit A to return omitted. Printed side page, 43 ante.]

94 [Exhibit B to return omitted. Printed side page, 47 ante.]

97 *Exhibit C to return*

IN RE INQUIRY AND INVESTIGATION OF METROPOLITAN EDISON COMPANY, ET AL.

IT–5015

Petition for rehearing granted and matters involved in this proceeding assigned for hearing

The Commission, having considered the matters involved in the inquiry and investigation instituted against Metropolitan Edison Company et al., Docket IT–5015, and the petition for rehearing filed therein by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, under date of February 23, 1937, grants said petition for rehearing and assigns the matters involved in this proceeding for hearing in the hearing rooms of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

The Secretary is directed to give notice to petitioners that the petition for rehearing has been granted and advise all parties in interest of the time and place of hearing.

[File endorsement omitted.]

98 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order staying proceedings

Filed Sept. 7, 1937

And now, to wit, September 7, 1937, after consideration of the application of Metropolitan Edison Company et al., after hearing and argument, it is

Ordered that the Federal Power Commission be, and it is hereby enjoined from proceeding with the hearing set by said Commission for September 14, 1937, in connection with the matters set forth in the petition in this case, until such time as this Court shall have determined the rule to show cause heretofore granted by this Court

on July 6, 1937, and the said rule granted July 6, 1937, and a full hearing on the merits are hereby set for hearing on October 4, 1937.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

99 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of argument and submission

And afterwards, to wit, the 4th day of October 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable John Biggs, Jr., Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 27th day of January 1938, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

100 In United States Circuit Court of Appeals, For the Third Circuit

No. 6447. October Term, 1937

METROPOLITAN EDISON COMPANY, NORTHERN POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for an Injunction Restraining the Federal Power Commission From Carrying on a Certain Investigation

Before BUFFINGTON, DAVIS, and BIGGS, Circuit Judges

Opinion

Filed January 27, 1938

DAVIS, Circuit Judge: The Public Service Commission of Pennsylvania instituted an inquiry and investigation into certain contracts and working arrangements which the petitioners and four other Pennsylvania corporations had with third parties. These other four corporations were not electric light or power companies. They were a bus company, a gas company, a water company, and a street
101 railway company and have now been dropped from these proceedings. The Pennsylvania Public Service Commission, here-

inafter called the Pennsylvania Commission, desired certain information in its investigation of the petitioners but could not secure it under the laws of Pennsylvania. The Governor and the Pennsylvania Commission called upon the Federal Power Commission, hereinafter called the Federal Commission, for assistance in securing the desired information. Thereupon the Federal Commission began an investigation of the petitioners in an effort to secure the information for use by the Pennsylvania Commission in its local or state problems.

Pursuant to its undertaking, the Federal Commission on January 6, 1936, made an "Order of Inquiry and Investigation of" the petitioners, the purpose of which was, the petitioners allege, to aid the Pennsylvania Commission in enforcing local law in regulating local affairs. The Petitioners filed answers to this order of January 6, 1936, challenging the jurisdiction and power of the Federal Commission to make the order.

Investigators or "accounting representatives" furnished the Federal Commission by the Pennsylvania Commission, made an accounting and report to the Federal Commission which thereupon made another order on January 26, 1937, directing the petitioners and thirty-three other companies to appear before it on March 3, 1937, in the Federal Commission's hearing room in Washington, D. C., for a hearing "to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly or indirectly, said respondents or who is controlled by any such person, and all expenditures and obligations
102 incurred thereunder that in any way affect or relate to the business of said respondents or either of them," etc.

The petitioners believing themselves aggrieved by the order, on February 23, 1937, petitioned the Federal Commission for a rehearing as provided in section 313 of the Act as a prerequisite for a court review. The petitioners raised two questions for the determination of the Federal Commission. They said that: 1. The Federal Commission did not have power to conduct an investigation for the sole purpose of supplying information to a State Commission for use in a proceeding designed to impose penalties under local law; and 2. The Federal Commission did not have jurisdiction over three of the petitioners because they operated entirely within the Commonwealth of Pennsylvania having no transmission lines, no interstate connections, transacting no business in interstate commerce and were not a "public utility" within the meaning of the Federal Power Act.

The day after the petition for rehearing was filed, the Federal Commission adjourned the hearing set for March 3, 1937, without day.

On March 24, 1937, the Federal Commission notified the petitioners that it had "granted the petition for rehearing * * * and assigned the matters involved in this proceeding for hearing in

the hearing room of the Commission in Washington, D. C., on April 14, 1937, at 10 A. M."

At the rehearing the petitioners offered evidence to show that three of them were not "public utilities" as defined by the Federal Power Act and that the purpose of the inquiry and investigation was to supply information to the Pennsylvania Commission for use in local proceedings designed to impose penalties under local, state law.

These were the only issues of fact raised by the petition and
103 the evidence of the petitioners. The Federal Commission, the petitioners allege, at the conclusion of the evidence of the petitioners over their vigorous objection, introduced evidence relating to the entire subject matter of the orders of January 6, 1936, and January 26, 1937, and in no way limited to the issues raised by the petition. They charge that the Federal Commission was continuing its investigation under the guise of conducting a rehearing for the purpose of determining the issues raised by the petition; that evidence was offered, for example, to show payments to various companies as far back as 1928, expenses incurred by petitioners in opposing the Wheeler-Rayburn Bill; charges for stationery and supplies; to show whether or not a foreign corporation (not one of the petitioners) was properly domesticated in Pennsylvania; the contents of minute books of foreign corporations other than the petitioners; what constitutes sound accounting practice; the business relations of persons other than petitioners with companies not claimed to be related to them in any way, etc.

They contend that the evidence introduced to establish these and other facts relates to the subject matter of the orders for the investigation of the petitioners and not to the issues raised in the petition for rehearing.

After the Federal Commission refused to change its course, a petition was filed in this court praying for an injunction to restrain the Federal Commission from thus continuing its investigation until it had determined the issues raised in the petition. The petitioners say that if the Commission is not restrained from continuing the investigation under the guise of a rehearing, the questions raised in the petition will be moot when the rehearing is completed and this court will be deprived of its appellate jurisdiction.

The Federal Commission says that:

104 1. This court does not have jurisdiction to review the Federal Commission's order of January 26, 1937, and,

2. If it does have such jurisdiction, the course pursued by the Federal Commission on the rehearing, if continued, was not such as to destroy the appellate jurisdiction of the court.

The Federal Commission contends that the so-called order of January 26, 1937, is really not an "order," but the mere notice of a hearing coupled with a subpoena duces tecum.

If this contention is true, the "Order of Inquiry and Investigation of Metropolitan Edison Company et al.," made on January 6, 1936, was a mere notice, for that one and the one of January 26, 1937, are

both called "order." Both begin and end in the same manner. After the declaratory parts, both orders continue with the mandate, "Now, therefore, it is ordered": in the one case, "That an investigation be, and the same is hereby instituted," and in the other, "That a hearing be held," etc. In both orders the petitioners are required to do definite things and to submit themselves to the further direction of the Federal Commission. The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, and constrained the petitioners to obedience at the risk of suffering severe penalties, civil and criminal, imposed by sections 315 and 316 of the Act.

The next technical question raised by the Federal Commission is that this order was not a final order and in consequence was not reviewable.

Section 313 (a) of the Act provides that. "Any person, State, municipality, or State Commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such
105 person, State, municipality, or State Commission is a part, may apply for a rehearing within thirty days after the issuance of such order. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."

In order to preserve the right to a rehearing, it is necessary that application therefor shall be made within thirty days after the order was made and no proceeding to review it shall be brought unless application for a rehearing has been made. Implicit in this provision is the right to a review of "any order," final or interlocutory, by which any person is aggrieved if he makes application for a rehearing within thirty days.

Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final, and satisfactory.

In remanding the case, we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this court of the orders of the Fed-
106 eral Commission and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here.

The Federal Commission is restrained from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it.

Judge Biggs does not concur in this opinion as a whole and within a few days will file an opinion dissenting in part and stating his views.

A true Copy:

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

107 In United States Circuit Court of Appeals, for the Third Circuit

[Title omitted.]

Dissenting opinion, concurring in part

Filed January 28, 1938

BIGGS, Circuit Judge: I think that I should make plain in what respects my opinion is in accord with or differs from that of the majority in the case at bar.

In August 1935, the Pennsylvania Public Service Commission commenced investigations of the petitioners and certain other
108 Pennsylvania corporations to ascertain facts in respect to their operating expense accounts and whether or not penalties should be imposed for certain alleged infractions of the Pennsylvania Utility Law. Certain phases of the investigation apparently could not be conducted adequately under the law of Pennsylvania and, at the request of the Pennsylvania Commission and the Governor, the Federal Power Commission, upon January 6, 1936, pursuant to Section 209 (b) and (c)[1] of the Federal Power Act (16 U. S. C. A. 824h) ordered an investigation of the petitioners.

The order of the Federal Power Commission of January 6, 1936, recited that full information concerning contracts, working arrangements, expenditures and obligations incurred by the petitioners was necessary to enable the Commission to determine whether the petitioners or other persons were violating the Federal Power Act, to

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[1] Sec. 209 (a) • • •

(b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

ascertain the effect of existing contracts for power upon the cost of production and transmission of electric energy by means of utility facilities under the jurisdiction of the Commission, and to aid
109 the Commission in the enforcement of the provisions of the Federal Power Act. Having made this order the Commission proceeded by its accountants to commence an investigation of the affairs of the petitioners and those corporations, copartnerships, or individuals allegedly connected with the petitioners. The petitioners permitted the examination by the Commission of the books and records of certain companies, conceding these companies to be affiliates, but refused to permit the examination of the books and records of certain other companies, copartnerships, and individuals because the petitioners would not concede them to be affiliates.

The accounting representatives of the Commission therefore prepared and submitted a report to the Commission which presented data allegedly tending to prove that certain named corporations, copartnerships and individuals controlled the petitioners and that these persons included both "conceded" and "non-conceded" affiliates of the petitioners. The Commission thereupon, on January 26, 1937, ordered a hearing and gave notice to these corporations, copartnerships and individuals to appear for examination before the Commission, with their books and records, to the end that the Commission might ascertain facts tending to prove or disprove the connection, or lack of it, of the "non-conceded" affiliates to the petitioners.

Section 313 (a) of the Federal Power Act (16 U. S. C. A. 8251 (a)) provides that any person aggrieved by order of the Commission may apply for a rehearing within thirty days after the issuance of such order. The subsection then states, "* * *. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." Subsection (b) of Section 8251, provides
110 a method for the review of an order of the Commission. If the petitioners were to obtain a review of the order of January 26, 1937, it was necessary therefore that they file a petition for rehearing with the Commission as provided by the Statute. Accordingly upon the 23rd of February 1937, the petitioners filed a petition for rehearing with the Commission, alleging that the Commission was without jurisdiction of the petitioners or the subject matter in the investigation, that the investigation itself was being conducted for an improper purpose and in derogation of the Constitutional rights of the petitioners. The petition for rehearing further alleged that three of the petitioners, viz., Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, were not engaged in the transmission or sale of electric energy in interstate commerce and neither owned nor operated facilities for its transmission or sale. The petition prayed that the order of January 26, 1937, be vacated and the proceedings stayed pending the disposition of the petition for rehearing.

The petition for rehearing was in the nature of a motion to dismiss the proceeding for want of jurisdiction in the Commission. To attempt

a simile, it was as if a defendant in a suit at law had moved to dismiss a declaration upon the ground that the court lacked jurisdiction both of the parties and of the subject matter. No testimony had been taken; no hearings had been held by the Commission. The extent of the investigation upon the date of the filing of this petition consisted of an examination of books of certain companies by the accountants of the Commission.

Upon March 23, 1937, the Commission granted the petition for rehearing and assigned it for hearing upon April 14, 1937, and upon this date the hearing took place. The petitioners introduced
111 evidence to prove that the Commission had no jurisdiction over Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, that the investigation was being carried on by the Federal Power Commission for the purpose of aiding the Pennsylvania Commission. Evidence was then offered on behalf of the Commission pertaining to its jurisdiction to compel the production of books and records of alleged non-affiliates of the petitioners in order that the control of the petitioners might be established. Certain of this evidence related to the identification of charges over a period of years made by one company to another, to allocation of expenses in fighting the Wheeler-Rayburn Bill through the medium of a corporation designated as Utility Clearing Corporation, to questions of qualification of a foreign corporation, and to charges reflected on the books of divers companies during 1934, arising from billings for services, materials, donations, and expenses. Some of the testimony offered may or may not have been of evidentiary value and may or may not have tended to show the connections of the petitioners with alleged non-affiliates. Some of the testimony taken seems to have failed to meet the requirements of the technical rules of evidence, but it should be noted that the Commission is not bound by such rules.[2] In my opinion, however, the question of pertinency of the testimony offered before the Commission cannot be raised by the record now before us.

Abruptly, the proceedings before the Examiner were termi-
112 nated by the petition for injunctive relief filed in this court. The petitioners prayed that the Commission be enjoined from taking any further steps in respect to the issues raised by its investigation until the rehearing had been disposed of and to enjoin the Commission from introducing any evidence except such as might prove that Erie Lighting Company, The Clarion River Power Company, and the Solar Electric Company were in fact "public utilities" within the terms of the Federal Power Act. It will therefore be seen that the petitioners sought to limit the jurisdictional inquiry of the Commission to a very narrow ground and to require it to decide the jurisdictional question piecemeal. The Examiner refused to so limit

[2] Section 308 (b) of the Federal Power Act (16 U. S. C. A. 825g (b)) provides:
"All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act."

the inquiry and allowed questions of jurisdiction raised by the inquiry and investigation as a whole. The rule to show cause sought by the petitioners was granted by this court and thereafter a stay was given.

The petitioners contend that the Commission by an enlargement of the inquiry into questions of jurisdiction beyond those presented by their petition for rehearing jeopardize the appellate jurisdiction of this court, that by proceeding with the hearing and requiring evidence to be given concerning companies which are non-admitted affiliates, the Commission must render moot the question of the right of the Commission to require such information. The petitioners seek to enjoin such action by the Commission, and to this end, invoke the provisions of Section 262, the "all writs" section of the Judicial Code (28 U. S. C. A. 377).

It should be borne in mind that the Commission now seeks information in a public hearing, that at this stage of the proceedings the Commission has done nothing more than to require that named corporations, individuals, and copartnerships appear before it with books and records. The Commission has taken some testimony and
113 now seeks to receive further evidence tending to show or disprove connections and control of the petitioners by way of affiliation. All other questions aside, I think that this court should not hold that any individual, copartnership or corporation may refuse information germane to this administrative inquiry because of reliance upon the commerce clause or the Fifth Amendment. It may be the case that the disclosure of such information will result in charges based upon alleged violations of the laws of Pennsylvania, but I think that we cannot concern ourselves with this. It cannot be assumed that investigations of the Federal Power Commission constitute mere wanton meddling or are for a disguised purpose. We must assume that the purposes of the Commission's inquiry are of penetration into the intricate affiliations of the Associated Gas and Electric System as that System affects the public interest. Even if the whole of that System is not engaged in the transmission and sale of electric energy in interstate commerce, the authority of the Commission to conduct such investigation as in the case at bar is expressed in Section 311 of the Act (16 U. S. C. A. 825j),[3] and the powers of investigation
114 thus given to the Commission are fraught with the plainest public interest.

[3] Sec. 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

The question presented to us, however, is a very narrow one. If this court has jurisdiction of the cause presented by the petition for review, it has such solely to the end that its appellate jurisdiction may not be destroyed or impaired. American Construction Co. v. Jacksonville T. & K. Railway Co., 148 U. S. 372, 379; Whitney v. Dick, 202 U. S. 132; McClellan v. Carland, 217 U. S. 268. This question in turn rests upon the question of whether or not the order of the Commission of January 26, 1937, and the proceedings thereunder are by their nature subject to review. The majority opinion of the court holds the order of the Commission reviewable. From this ruling I must respectfully dissent.

Whether or not the order of January 26, 1937, be in fact an order of inquiry regularly entered before a hearing of the Federal Power Commission or whether it be of the nature of a mere subpoena duces tecum, it is not a final order entered after hearing and finding of fact and is procedural and interlocutory in its nature, and therefore, if the investigation proposed by the order is proceeded with, the appellate jurisdiction of this court will not be destroyed.

Subsection (b) of Section 313 of the Federal Power Act (16 U. S. C. A. 825l (b)) provides:

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located, or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

115

he Commission may modify its findings as to the facts by reason of he additional evidence so taken, and it shall file with the court such odified or new findings which, if supported by substantial evidence, hall be conclusive, and its recommendation, if any, for the modifica- ion or setting aside of the original order. The judgment and decree f the court, affirming, modifying, or setting aside, in whole or in art, any such order of the Commission, shall be final, subject to review y the Supreme Court of the United States upon certiorari or certifi- ation as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

16 The order of January 26, 1937, is merely an interlocutory of procedural order. The Commission, pursuant to Section 208 of he Act, heretofore referred to, prescribes its own rules of procedure nd must itself pass upon the propriety of the evidence offered and s admissibility. For this court to pass upon such questions during he pendency of a hearing before the Commission is to compel us in ffect to sit with the Commission throughout every phase of its nquiry. If such a view be adopted the appellate court, as in the case t bar, in limine may be called upon to determine the jurisdiction of he Commission over the inquiry it seeks to conduct, to pass upon all uestions of evidence offered in the course of the investigation and pon the pleadings, all before the determination of any final issue by he Commission. The result would be precisely similar to that which ould come to pass if a review would lie to an appellate court from very ruling or order of a trial court, no matter whether interim, nterlocutory, procedural or final. The hearings before the Com- ission would be subjected to interminable interruptions by peti- ons for review to the Circuit Courts of Appeals to determine the gality of every order made by the Commission. Such a result nevitably would emasculate the Federal Power Act and render the ommission unable to pass upon the very matters for which it was reated, matters greatly affecting the public interest. In my opinion uch a result would be intolerable.

Moreover the language of Section 313 of the Act does not lend itself such a conclusion. Subsection (b) uses specific language which ompels an opposite interpretation. That subsection states that the finding of the Commission as to facts "* * * if supported

17 by substantial evidence, shall be conclusive." This language is substantially similar to that used by Congress in sections of he laws providing for reviews from similar administrative and quasi- udicial tribunals. The subsection further speaks of the right of a arty to a proceeding to adduce additional evidence upon a showing the court of appeals that such evidence is material to the issues. It rovides that the Commission may modify its findings as to the facts y reason of such additional evidence. These provisions plainly indi- ate that findings of fact shall be made by the Commission and that rders based thereon are subject to review. Subsection (b) speaks of

the "transcript of the record" to be certified to the Court of Appeals. Such a phrase used in its ordinary connotation indicates the record as a whole upon which the findings of the court below are based. In the case at bar there is neither transcript of record nor findings of fact. Further the use of the word "rehearing" in subsection (a) plainly presupposes that prior hearings have been had and that findings of fact have been made by the Commission upon which an order final in nature has been based.

The right of an inferior court to try a case submitted to it, undisturbed by interference from an appellate tribunal, is established beyond any question. Bank of Columbia v. Sweeney, 1 Pet. 567, 569; The Life and Fire Insurance Company of New York v. Adams, 9 Pet. 573, 602; American Construction Company v. Jacksonville T. & K. Railway Company, supra; Dooley Improvements, Inc. v. Nields, District Judge, 72 F. (2d) 638; Raritan Copper Works v. Elliott, 271 F. 284.

In the case at bar there is no order which is the equivalent of "a judgment entered upon a state of facts," as in the case of
118 American Sumatra Tobacco Corp v. Securities and Exchange Commission, — F. (2d) —. The similarity between the review provisions of the Federal Power Act and the Securities Exchange Act should be noted.

In the case of Minneapolis Chamber of Commerce v. Federal Trade Commission, 280 F. 45, the Circuit Court of Appeals for the Eighth Circuit, passed upon the right of the appellate court to review a preliminary order of the Federal Trade Commission. As in the case at bar it was contended by the petitioner that the Commission was without jurisdiction both of the parties and the subject matter. In dismissing the petition for want of jurisdiction, the court stated: "What is really sought by petitioners is that this court should halt inquiry at the threshold, exercising, in effect, the powers of a court of original jurisdiction in which a cause is pending, to rule in limine upon the propriety of the action and whether it should proceed further. The procedure invoked is similar, in effect, to that prevailing in a court of original jurisdiction, which has control of the successive steps of pleading, practice, trial, and final judgment or decree. But it must be remembered that this court has no original jurisdiction of this nature. Its functions, under the act before us, are confined to a review of certain acts of the Federal Trade Commission, which are specifically defined by the Congress. This act creates powers not otherwise conferred upon Circuit Courts of Appeals, and such courts are limited strictly to the powers thus specified. It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise preliminary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recom-
119 mendation submitted, then it has in effect been constituted an original tribunal of controversies of this nature. This was in

nowise contemplated, nor would it comport with the legitimate practical functions of a court of this nature."

The provisions of Section 313 of the Federal Power Act are very similar to those of the Interstate Commerce Act. The latter Act confers original jurisdiction upon the district courts of the United States of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." (June 18, 1910, c. 309, Section 1, 36 Stat. 539; March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. A. 41, subdivision (28)).) In the leading case of United States v. Illinois Central R. R. Co., 244 U. S. 82, the Supreme Court reversed an order of a district court setting aside a procedural order of the Interstate Commerce Commission. The order of the Commission referred to set a cause for hearing at a specified time and place. The Supreme Court in its opinion stated: "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in Proctor & G. Company v. United States—one which constrained the Railroad Company to obedience, unless it was annulled or suspended by judicial decree."

The powers of the Federal Power Commission are clearly defined by the Federal Power Act. Such powers expressly include the right to prohibit the issuance of securities or assumption of liability by a utility; to declare rates and changes of utilities to be unjust
120 and unreasonable; to approve or disapprove the sale or lease of utility facilities; and to determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Orders, final in their nature, entered by the Commission after hearing and findings of fact, in the premises indicated, are subject to the review of the Circuit Courts of Appeals. Other orders, interim, procedural, or interlocutory, are not so reviewable. To hold otherwise, in my opinion, would constitute an unwarranted invasion of the powers of the legislative and executive branches of the Government.

In view of the foregoing it follows that the appellate jurisdiction of this court is in no wise jeopardized or impaired by the order of the Commission of January 26, 1937, or the proceedings of the Commission thereunder, and that therefore the provisions of Section 262, the "all writs" section, of the Judicial Code, cannot be invoked successfully by the petitioners.

I therefore concur in the majority opinion of the court only to the extent that it permits the resumption of hearings upon the petition for rehearing, but I nowise concur in and dissent from the ruling that the inquiry by the Commission upon the petition for rehearing must be limited as sought by the petitioners. In my opin-

ion this court is without jurisdiction to restrain or in anywise interfere with the proceedings now before the Commission, and will remain so until some order of the nature of a judgment entered upon a state of facts be made by the Commission and a review thereof is sought. Until such time the Commission must be permitted to proceed with its investigation undisturbed by the mandates of this court precisely as an inferior court would be allowed to proceed with the trial of a pending cause. The petition filed herein should be dismissed.

121 In view of the great public interest in the questions presented by the case at bar and the gravity of the court's decision, this dissent is written, as stated by Judge Woolley in General Electric Co. v. DeForest Radio Company, 44 F. (2) 931, 946, "with the hope that it will arrest the attention of the reviewing court."

A true Copy:
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

122 In United States Circuit Court of Appeals for the Third Circuit

No. 6447. October Term, 1937

METROPOLITAN EDISON COMPANY, NORTHERN POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

Judgment

Filed Jan. 27, 1938

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause be remanded to the Federal Power Commission for determination in accordance with the opinion of this Court, and that the said Federal Power Commission be restrained from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it.

Philadelphia, January 27, 1938.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

123 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order that opinion heretofore filed be considered as the findings of fact and conclusions of law

Filed Mar. 7, 1938

The opinion as filed by this Court on January 27, 1938 shall stand as the findings of fact and conclusions of law required under Rule 70½.

Philadelphia, March 7, 1938.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

124 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Motion to complete record

Filed March 7, 1938

Now comes the Respondent, Federal Power Commission, by its attorneys and represents to the Court:

First, That Equity Rule 70½ (28 U. S. C. A. 723) requires that "the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."

Second, That the Court has not set forth, upon the record in this cause, findings of fact specially and has not stated separately its conclusions of law thereon.

Wherefore, Respondent moves that the record in this cause be completed as required by Rule 70½, that the Court find the facts specially and state separately its conclusions of law thereon, or, if the Court intends that its opinion as filed on January 17, 1938, stand as such findings of fact and conclusions of law that such an order be entered.

Respectfully submitted.

OSWALD RYAN, *General Counsel,*
LAMBERT MCALLISTER, *Attorney,*
WILLIAM C. KOPLOVITZ, *Attorney,*
Attorneys for Respondent,
Federal Power Commission.

125 WASHINGTON, D. C., *March 3, 1938.*

SAUL, EWING, REMICK & SAUL,
2301–17 Packard Building, Philadelphia, Pennsylvania.

Please take notice that the above motion will be presented to the Court for consideration at 10 a.m. on March 7, 1938, or as soon thereafter as counsel for Respondent may be heard.

OSWALD RYAN, *General Counsel.*

WASHINGTON, D. C. *March 3, 1938.*

[File endorsement omitted.]

126 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed April 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument on May 2, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice ROBERTS took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on January 27, 1938 (R. 62), restraining the Federal Power Commission from proceeding with a certain hearing in the course of an inquiry and investigation instituted by the Commission upon its own motion, unless the Commission restricts the issues and evidence to those specified by the court below.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 50) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on January 27, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Federal Power Commission on January 26, 1937, entered an interim or procedural order in the course of an investigation, giving notice of hearing to determine its jurisdiction over certain companies whose status as affiliates of certain utilities was disputed. On respondents' request, a so-called rehearing of this order was granted. During the so-called rehearing, the Commission proferred evidence, received by the trial examiner, to which respondent objected as irrelevant to the jurisdictional issues raised in the request for rehearing. Respondents thereupon sought, and obtained, an injunction in the Circuit Court of Appeals enjoining the introduction of evidence by the Commission before the examiner except as limited in accordance with respondents' view of relevancy. The questions presented are:

1. Whether the order of January 26, 1937, is an appealable order under Section 313 of the Federal

Power Act, so that a Circuit Court of Appeals has authority under Section 262 of the Judicial Code to issue an injunction in aid of its appellate jurisdiction in respect of such order.

2. Whether a court may enjoin the proffer of evidence at a hearing before a trial examiner of an administrative agency, in the course of an investigation, on the ground that the evidence is not relevant to the issues to be determined at the hearing.

STATUTES INVOLVED

The relevant provisions of the Judicial Code and the Federal Power Act are printed in the Appendix, *infra,* pp. 22–26.

STATEMENT

The facts, as shown by the petition of respondents in the court below (R. 1–35) and the return of the Commission to the rule to show cause (R. 40–49), are as follows:

[redacted]

On January 6, 1936, more than a year prior to the order and hearing now complained of, the Federal Power Commission, on its own motion, entered an order of inquiry and investigation directed to the complainants below, hereinafter called respondents, to determine certain facts regarding (1) the ownership, operation, management, and control of respondents; (2) contracts and working arrangements in effect between respondents and individuals, firms, and corporations which are affiliated with respondents (R. 23). Respondents were required to file copies of all such contracts and a

full and complete statement of all such working arrangements; to submit complete statements of the charges appearing on their books for the years 1934 and 1935, representing payments made and obligations incurred with any affiliate and to make available for examination by the Commission's representative upon demand, all books, accounts, memoranda, records, and correspondence of the respondents and all affiliates in so far as they related to the transactions with or the business of the respondents. A copy of the order was served upon each respondent (R. 24). Authority for such investigation and order is conferred by Sections 301 (c), 307, and 311 of the Federal Power Act, *infra,* pp. 22–25.

Respondents, with certain unimportant exceptions, filed returns to the Commission's order as required. The books, accounts, memoranda, records, and correspondence of the respondents, and of certain affiliates, were made available to representatives of the Commission for examination. But the Commission's representatives were denied access to the books, accounts, memoranda, records, and correspondence of certain persons whom respondents claimed to be non-affiliates. The jurisdiction of the Commission and its right to have access to such books, records, accounts, memoranda, and correspondence as provided by Section 301 (c) of the Federal Power Act was brought directly into issue. The information which had been gathered by the representatives of the Commission was embodied

in a report to the Commission under date of December 10, 1936. (R. 42–45.)

On January 26, 1937, the Commission issued an order and notice that a hearing was to be held on March 3, 1937, to ascertain and determine all facts regarding (1) the ownership, operation, and management of respondents; (2) contracts and working arrangements between respondents and affiliates; and (3) expenditures made and obligations incurred under such contracts and working arrangements that in any way affected or related to the business of respondents (R. 25). Said order and notice of hearing, which was in the nature of a subpena duces tecum, also directed respondents and certain designated affiliates with whom respondents had business transactions during 1934 and 1935, as disclosed by books of respondents, to appear at the hearing and present for the record certain specified information disclosing: (1) the control exercised over the management of respondents and the control and management of designated affiliates; (2) contracts and working arrangements between respondents and such affiliates and all charges made and obligations incurred in relation thereto (R. 26). Thereafter, on February 23, 1937, respondents filed a "petition for rehearing" directed to the order of January 26, 1937, asserting that such order was a final "order" reviewable by a Circuit Court of Appeals under Section 313 (b) of the Federal Power Act, *infra,* p. 26, and that a petition for rehearing was there-

fore proper under that section. (R. 3, 13.) This petition, though labelled a "petition for rehearing," was filed before any hearing was had or could be had on the issues framed by the order of January 26, 1937, and was in substance a request "for the vacation of" that order for want of jurisdiction over the parties and subject matter.[1]

On February 24, 1937, the Commission continued without day the hearing set by its order and notice

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[1] The so-called petition for rehearing stated (R. 14): "This petition is made for a rehearing with respect to a certain order made herein by the Federal Power Commission (hereinafter referred to as the 'Commission'), on January 26, 1937, and for the vacation of said order on the following grounds:

(1) that said order was made in pursuance and as part of an investigation heretofore instituted by the Commission and now being prosecuted by it, relating to solely local and intrastate matters, and instituted and prosecuted for the sole purpose of supplying information to the Public Service Commission of the Commonwealth of Pennsylvania (hereinafter sometimes referred to as the 'Pennsylvania Commission'), to assist the Pennsylvania Commission in the prosecution of certain proceedings instituted and now being prosecuted by it, relating to solely local and intrastate matters, and having for their object the enforcement of Pennsylvania statutes, and rules of the Pennsylvania Commission, and the imposition of penalties prescribed by the laws of the Commonwealth of Pennsylvania;

(2) that the Commission is without jurisdiction of the petitioners herein in the premises;

(3) that the Commission is without jurisdiction of the subject matter of said investigation;

(4) that said investigation and said order invade the rights of petitioners guaranteed to them by the Constitution of the United States;

of hearing of January 26, 1937 (R. 29). On March 23, 1937, the Commission issued a notice to respondents granting the petition for rehearing and assigning the issues raised in the proceeding for hearing at a later date (R. 47, 49). On April 14, 1937, the hearing was begun before an examiner of the Federal Power Commission. Respondents introduced evidence tending to show that the Erie Lighting Company, the Clarion River Power Company, and the Solar Electric Company, three of the respondents, operated wholly within the State of Pennsylvania and were intrastate in character. The respondents also introduced evidence to support their contention that the purpose of the inquiry was to obtain information for the use of the Pennsylvania Public Service Commission in connection with an investigation which it had instituted and which was then in progress. (R. 6.)[2]

After respondents had concluded the introduction of such evidence as they proposed to offer, the attorneys for the Federal Power Commission began the introduction of evidence relating to the jurisdiction of the Commission to issue the order of

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(5) that said order is not authorized by the Federal Power Act;

(6) that if said investigation and said order are authorized by the Federal Power Act, then said Act is in violation of the Constitution of the United States; all as more fully hereinafter set forth"

[2] A transcript of the proceedings before the examiner was filed in the court below, and has been certified by the clerk of that court and filed herewith in this Court.

January 26, 1937, under Section 301 (c) of the Act. That section authorizes the Commission to require the production of books, records, etc., of companies affiliated, under common control, with a licensee or utility subject to the jurisdiction of the Commission, in so far as the records relate to the business of such licensee or utility. The evidence proffered and intended to be proffered was designed to show that charges reflected on the books of respondents originated with alleged non-affiliates and that the latter were in fact under common control with respondents. Respondents objected to the introduction of such evidence on the ground that it was not relevant to the jurisdictional issues made by their "petition for rehearing" and by the evidence introduced by them. These objections were overruled by the trial examiner. (R. 30–34, 47–48.)

Thereupon, on April 21, 1937, one week after the commencement of the hearing, respondents filed a petition in the United States Circuit Court of Appeals for the Third Circuit praying for a rule to show cause and for a stay of proceedings before the Federal Power Commission (R. 1). The respondents insisted that the Commission be required to limit the pending hearing solely to the jurisdictional questions upon which the respondents had introduced evidence. The Circuit Court of Appeals on July 6, 1937, issued the rule as prayed (R. 36). The Commission, having made a return to the rule on September 21, 1937, prayed that the rule be dis-

charged, the stay of the proceedings terminated, and the petition dismissed (R. 40–49).

On January 27, 1938, the Court of Appeals, one judge dissenting, rendered its decision (R. 50) restraining the Commission from proceeding with its proposed inquiry and investigation until the two issues raised in the petition for rehearing have been decided by the Commission. By way of direction to the Commission, the majority opinion states: "The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material." The cause was ordered "remanded" to the Commission, although the case had not come to the Court of Appeals on appeal. In fact, no statutory or judicial authority establishing jurisdiction in the Court of Appeals was cited in the majority opinion or in the respondents' petition in that court. The dissenting opinion of Judge Biggs states that Section 262 of the Judicial Code, commonly known as the "all writs" section, was invoked. After a review of pertinent decisions, not adverted to in the majority opinion, Judge Biggs concluded that the order of January 26, 1937, was not an appealable order; that hence there was at this time no appellate jurisdiction to protect under Section 262; that the court therefore was without power to issue an injunction;

and that the result of the decision, sanctioning judicial intervention in administrative hearings, would be to "emasculate the Federal Power Act and render the Commission unable to pass upon the very matters for which it was created." (R. 54–62.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that an interim or procedural order, interlocutory in its nature, is a reviewable order under the provisions of Section 313 of the Federal Power Act.

2. In holding that Section 262 of the Judicial Code conferred authority on the court to grant the relief played for.

3. In supervising the proffer of evidence in the course of an administrative hearing before the Federal Power Commission and in limiting the issues upon which evidence might be received.

4. In not holding that respondents had a plain, adequate, and complete remedy at law, and that their administrative remedies had not been exhausted.

5. In failing to dismiss respondents' petition.

REASONS FOR GRANTING THE WRIT

The decision below marks an unprecedented departure from the principles governing orderly review of administrative action. Unless the decision is reversed, it will tend to unsettle the law in this

regard not only in relation to the Federal Power Commission but in relation to most of the other Federal administrative agencies as well.

1. In holding that the order of January 26, 1937, is an appealable order, the decision below fails to follow the applicable decisions of this Court and is in conflict with numerous decisions of the Circuit Courts of Appeals.

While the proceeding below was not an appeal from the order of January 26, 1937, the appealability of that order became the basic question to be decided in order to determine whether there was jurisdiction under the "all writs" section of the Judicial Code (section 262) to entertain the proceeding. The order was in two parts. (R. 26.) Paragraph (a) gave notice to 39 persons, firms, and corporations, including the six respondents herein, that a hearing would be held to determine the status of certain companies which had claimed to be nonaffiliates of respondents but which the Commission had reason to believe, from its field examination, were in fact affiliates having transactions with respondents and so subject to the investigatory powers of the Commission. Paragraph (b) of the order was in substance a subpena duces tecum requiring the attendance on March 3, 1937, of the 39 persons, firms, and corporations, with certain records and documents. This order was plainly an interim or procedural order of the character that this Court has repeatedly held nonappealable under statutory provisions containing

language similar to that of the Federal Power Act. The Act, in providing for an appeal from "any order" of the Commission, makes it clear that orders which are merely procedural, entered properly without prior hearing, based on no record, and embodying no judgment cannot be reviewed on appeal to a Circuit Court of Appeals. The Act provides, in section 313, prescribing the requirements for appeal, that the Commission must certify and file with the court a "transcript of the record" upon which the order complained of was entered; that the "findings" of the Commission as to the facts, if supported by substantial evidence, shall be conclusive; that "additional" evidence may be adduced upon leave of court if there were reasonable grounds for failure to adduce such evidence before the Commission. These provisions of the statute must be ignored if mere interim, procedural or interlocutory orders of the sort here involved, setting down for hearing a question of jurisdiction in the course of an investigation, can be reviewed on direct appeal to a Circuit Court of Appeals.

The applicable rule was announced by this Court in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82. There it was argued that an order of the Interstate Commerce Commission assigning for hearing certain complaints filed with it was reviewable under the provision of the Urgent Deficiencies Act of 1913, conferring on the district courts jurisdiction to enjoin, set aside, annul or

suspend "any order" of the Commission. It was argued that the Commission lacked jurisdiction to hold the hearing; that the company would be subjected thereby to needless burden and expense; and that an order of reparation entered at the conclusion of the hearing would constitute *prima facie* evidence in suits brought against the carrier on the basis of the awards. Despite these contentions this Court held the order not reviewable. See also *United States* v. *Los Angeles R. R.*, 273 U. S. 299, holding that an order determining the final valuation of railroad property is not reviewable. The *Illinois Central* case was applied in *New York, O. & W. Ry. Co.* v. *United States*, 14 F. (2d) 850 (S. D. N. Y.) (Rogers, Hough and Bondy, JJ.) to preclude review of an order of the Commission reopening a valuation proceeding in respect of items never objected to by the carrier, the carrier having protested in respect of only a few items. Despite the question raised as to the authority of the Commission, and the allegations of burden and expense to the railroad, the court held that review did not extend to orders "relating to practice or procedure" (p. 851). The decision was affirmed *per curiam*, 273 U. S. 652.

The fact that paragraph (b) of the order in question was in the nature of a subpena duces tecum does not affect the case. In the first place, the issuance of such a subpena does not involve the requisites of prior notice, hearing, evidence, and findings by the Commission which section 313 (b)

of the Act contemplates in providing for appeal from orders of the Commission. See *Securities & Exchange Commission* v. *Andrews,* 88 F. (2d) 441, 442 (C. C. A. 2nd). In the second place, the Commission has no power to enforce its subpenas except by a proceeding in a district court for that purpose; hence it is not to be supposed that if questions as to the validity of the subpena were raised, a party could anticipate the possible enforcement of the subpena and "appeal" to a Circuit Court of Appeals from its mere issuance. While it is true that penalties attach for disregard of a subpena, these can be stayed on application to the Commission, and such application is required to exhaust administrative remedies. *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 309–310. And finally, the subpena is out of the case in any event, and has been so since the hearing before the Commission. The subpena required attendance on March 3, 1937; respondents' petition for "rehearing" was filed with the Commission February 23, 1937, and on February 24, 1937, the hearing set for March 3 was continued without day (R. 29), so that the subpena was permitted to lapse. To avoid doubt on that score the Commission stipulated in the court below that the subpena had expired and that no effort would be made to enforce it (R. 35). For all these reasons, then, the order of January 26, 1937, so far as appealability is concerned, is no more than a notice of hearing.

Other comparable preliminary orders of administrative agencies have repeatedly been held non-appealable. Thus, in *Jones* v. *Securities & Exchange Commission,* 79 F. (2d) 617 (C. C. A. 2nd), the court dismissed for want of jurisdiction an appeal from an order denying permission to withdraw a registration statement, though the statute granted a right of review to "any person aggrieved by an order of the Commission." This Court denied certiorari, 297 U. S. 705, on the same day that it granted certiorari in a companion case arising on an order of the District Court requiring obedience to a subpoena. 297 U. S. 699 (reversed on the merits, 298 U. S. 1). And in *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A. 8th), where the Circuit Court of Appeals was asked to set aside an order of the Federal Trade Commission denying motions to dismiss a complaint set down for hearing before the Commission, the court said (p. 48):

> It is our judgment that neither the District Court nor this court has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside.

And see *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board,* 73 F. (2d) 489 (C. C. A. 4th).

This uniform course of decisions respecting administrative orders conforms closely to the principles governing review of judicial proceedings. It is well settled that except in classes of cases where specific statutory exception is made, an appellate court will not review interlocutory rulings made during the course of proceedings in an inferior court. *McLish* v. *Roff*, 141 U. S. 661. The reasons for this rule in the case of judicial proceedings were stated in *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 379, quoting Chief Justice Marshall. To review by mandamus a ruling or interlocutory order made in the course of a trial would, the Court said:

> * * * "be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for re-examination;" would "introduce the supervising power of this court into a cause while pending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

It is noteworthy that in holding the order of January 26, 1937, to be an appealable order, the opinion

of the court below not only fails to consider any of the decisions discussed above, but cites no authority; and, it is submitted, none exists.[3]

2. What has been said indicates that, as there was no appealable order, statutory jurisdiction in the court below to grant injunctive relief under section 262 of the Judicial Code was wholly lacking. But apart from this conclusion, the granting of an injunction to control the reception of evidence in an administrative hearing violates established canons of judicial administration. Those canons have been restated by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, No. 181, decided January 31, 1938, shortly after the decision below was rendered. As was there observed, attempts to enjoin administrative hearings on the ground of want of jurisdiction, needless burden and expense, and injury to credit and good will, have repeatedly been rejected. *Federal Trade Commission* v. *Claire*

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[3] In the court below respondents relied on *American Sumatra Tobacco Co.* v. *Securities & Exchange Commission*, 93 F. (2d) 236 (App. D. C.). That case held that an order of the Securities and Exchange Commission denying an application for confidential treatment of certain data in a registration statement was appealable. As a basis for its decision that court ruled that a hearing was necessary to support such an order, and that hence the statutory requisites for appealability were present. Without conceding the correctness of that decision, it is manifestly inconsistent with respondent's contention in the present case, for here confessedly no prior hearing was required to support the order of January 26, 1937.

Furnace Co., 274 U. S. 160; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5th); *Macfadden Publications* v. *Federal Trade Commission*, 37 F. (2d) 822 (App. D. C.); *Minneapolis Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45 (C. C. A. 8th). In the last cited case the court declared (p. 47):

> It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recommendation submitted, then it has, in effect, been constituted an original trial tribunal of controversies of this nature. This was in no wise contemplated, nor would it comport with the legitimate practical functions of a court of this nature.

In the present case the grounds urged for injunctive relief are even less plausible than in the cases cited above. Here the respondents seek to restrain a hearing not on the ground that the Commission lacks authority to conduct it, nor on the ground that testimony is being illegally compelled, but on the ground that evidence is being adduced before a trial examiner which, it is contended, is irrelevant to the issues on the so-called rehearing sought by respondents. Taking respondents' contentions in their most favorable light, it is difficult to discover

any basis for a claim of injury. While, as suggested in argument below, the reception of evidence found to be irrelevant may somewhat prolong the hearing, recourse to a Circuit Court of Appeals to correct the assumed error is a dilatory practice hardly to be justified on the basis of expedition, as the course of the present case sufficiently demonstrates. The reception of evidence deemed irrelevant is one of the lesser delays ordinarily incident to litigation.[4]

The rule requiring exhaustion of administrative remedies is peculiarly applicable here, for relief by injunction is sought even before the objections to the admission of evidence have been reviewed by the Commission itself. As Judge Biggs observed in his dissenting opinion, "For this court to pass upon such questions during the pendency of a hearing before the Commission is to compel us in effect to sit with the Commission throughout every phase of its inquiry." And since the judicial power exercised by courts established under Article III of the Constitution does not extend to the supervision of quasi-legislative proceedings, intervention in this

[4] Compare: "Upon the Board's petition under § 10 (e) to enforce the order, heard April 1, 1936, the Court of Appeals for the Third Circuit gave judgment after a delay of one year and two months, during which there were three postponements and two reargruments." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413, decided February 28, 1938, p. 2.

manner at this stage raises also a question of constitutional authority. Cf. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, and cases cited.

3. The decision and decree below jeopardize the progress of an important investigation undertaken by the Commission. The Commission is ordered to proceed with the rehearing and to present only such evidence as is "relevant" to the issues raised by the respondents' evidence. The test of admissibility is that the relevance must be "apparent and logical and not far-fetched and remotely inferential." "Some of the evidence" introduced did not, in the view of the court, meet this criterion. Thus the Commission is forced to apply a vague test of relevancy laid down in advance, presumably on pain of contempt should it err in the reception of evidence. Furthermore, the decree enjoins the investigation, until the "rehearing" is completed, not only under the order of January 26, 1937, but also under the order of January 6, 1936, which set in motion the entire investigation. (R. 62.) On no conceivable hypothesis could the court assume to protect its appellate jurisdiction in respect of this earlier order, as the time to appeal therefrom, if the order be thought appealable, had expired by more than a year when the jurisdiction of the court below was invoked.

4. The decision below, unless reversed, will constitute a precedent of general importance. Hith-

erto the Federal administrative agencies have been held to be free from intervention in the progress of their proceedings. This has been true of the Interstate Commerce Commission (*United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82), the Federal Trade Commission (*Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160), the Securities and Exchange Commission (*Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617 (C. C. A. 2d), certiorari denied, 297 U. S. 705), the Federal Communications Commission (*Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729 (App., D. C.), certiorari denied, 296 U. S. 624), and the National Labor Relations Board (*Myers et al.* v. *Bethlehem Shipbuilding Corp., Ltd.*, Nos. 181, 182, decided January 31, 1938). No reason appears for adopting a contrary position with respect to the Federal Power Commission. The gravity of the decision lies in its unsettling effect on the principles governing review of administrative action, and particularly in the possibility that each successive step in an administrative proceeding or quasi-legislative investigation may be made the subject of separate review in the courts. Such an innovation would be subversive of orderly judicial administration.

CONCLUSION

In view of the nature of the case, it is requested that certiorari be granted and the case set down for argument at this Term; or, in the alternative, that

certiorari be granted and the decree below be reversed forthwith with directions that the petition of respondents in the court below be dismissed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

OSWALD RYAN,
General Counsel,
Federal Power Commission.

APRIL 1938.

APPENDIX

Judicial Code, Section 262 (U. S. C., Title 28, Sec. 377):

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.)

Federal Power Act, c. 687, 49 Stat. 803 (U. S. C. Sup. II, Title 16, Sec. 825):

> SEC. 301. (c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, in so far as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.
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> * * * * *
>
> SEC. 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforce-

ment of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspond-

ence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

* * * * *

SEC. 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as prac-

ticable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

* * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued

by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions

as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION ON BEHALF OF THE FEDERAL POWER COMMISSION TO SHORTEN TIME FOR FILING BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND TO ADVANCE CASE FOR ARGUMENT IF CERTIORARI IS GRANTED

Comes now the Solicitor General on behalf of the Federal Power Commission, petitioner in the above entitled cause, and respectfully moves the Court that the time for filing a brief in reply to the petition for writ of certiorari be shortened and that the case be advanced for argument on Monday, May 2,

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1938, or as near thereto during the present term as is agreeable to the Court, in the event that the writ of certiorari is granted and the Court does not desire to reverse the decree of the court below forthwith.

This cause arose out of a proceeding commenced in the United States Circuit Court of Appeals for the Third Circuit seeking to enjoin and prevent the Federal Power Commission from introducing certain evidence in the course of an investigation and hearing instituted by the Commission for the purpose of ascertaining all facts regarding: (1) the ownership, operation, and management of respondents; (2) contracts and working arrangements between respondents and affiliates; and (3) the expenditures made and obligations incurred under such contracts and working arrangements that in any way affected or related to the business of the respondents. The Circuit Court of Appeals on January 27, 1938, entered its decree restraining the Commission from proceeding with the above-mentioned hearing unless the Commission restricts the issues to those specified in the opinion of the court below and introduces only evidence which the opinion attempts to define as "relevant." The petition of the Federal Power Commission to this Court for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals was filed on April 1, 1938, and requested that certiorari be granted and the case set down for argument at this Term; or, in the alternative, that cer-

tiorari be granted and the decree below be reversed forthwith with directions that the petition of the respondents in the court below be dismissed.

Copies of the petition for a writ of certiorari and transcript of record were mailed immediately to counsel for the respondents and receipt thereof acknowledged on April 2, 1938. The time for filing a brief in reply to the petition consequently expired on April 22, 1938. On April 20, 1938, however, counsel for the respondents secured from Mr. Justice Roberts an order extending until May 2, 1938, the time for filing a brief in reply to the petition on the ground that respondents' counsel desired to negotiate with the Solicitor General to obtain a stipulation that the transcript of hearings before the Federal Power Commission be included as a part of the record in this Court and printed as such in the event that certiorari should be granted.

As is apparent from the petition for writ of certiorari the question raised by the decree and opinion of the Circuit Court of Appeals is one of great public importance. The gravity of the decision lies in its unsettling effect on the principles governing the review of administrative action, and the confusion resulting from the unsettled state of the law is materially interfering with the administration of the Federal Power Act. Moreover, the immediate effect of the decision below is to jeopardize the progress of an important and far-reaching investigation undertaken by the Federal Power Commission, which has now been delayed for more

than a year. The opinion of the court below orders the Commission to present only such evidence as is relevant to issues raised by the respondents. The test of admissibility is that the relevancy must be "apparent and logical and not far-fetched and remotely inferential." Thus, the Commission is forced to apply a vague test of relevancy laid down in advance, presumably on pain of contempt should it err in the reception of evidence. Unless the restrictions of the court below placed upon the Commission are promptly removed, the Commission will be unable to proceed with its inquiry until the end of the present year in the event of a favorable decision by this Court.

In seeking an extension of time for filing a brief in reply to the petition for writ of certiorari, counsel for the respondents did not advise the Government of its application and no attempt has been made either before or since the extension of time to open negotiations with the Solicitor General for the inclusion of the transcript of the hearings before the Commission as a part of the record in this Court and for its printing as such if certiorari is granted. As is apparent from the petition for writ of certiorari (p. 7, note 2), the testimony before the Commission was not a part of the record in the Circuit Court of Appeals and therefore is not a part of the record in this Court or required to be printed as such. The transcript of the hearings was merely lodged in the Circuit Court of Appeals for the information of that court and has likewise

been lodged with this Court for a similar purpose. It is therefore available for consideration by this Court if the Court desires to examine it. There is consequently no reason for any delay in the filing of a brief in reply to the petition on the ground that time is required for negotiations with the Solicitor General for the inclusion of the transcript of hearings before the Commission as a part of the record in this Court or for its printing as such in the event that the writ of certiorari is granted.

In the light of these circumstances the Government feels that the extension of time was obtained by the respondents for no other purpose than to delay further an early determination by this Court of the question involved and to prevent the Federal Power Commission from proceeding with an investigation of far-reaching importance.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1938.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 94 F. (2d) 943.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on January 27, 1938 (R. 62). The petition for certiorari was filed on April 1, 1938, and was granted on April 28, 1938.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the order of the Federal Power Commission of January 26, 1937, an appealable order under Section 313 of the Federal Power Act, so that the Circuit Court of Appeals had authority under Section 262 of the Judicial Code to issue an injunction in aid of its appellate jurisdiction in respect of such order?

2. Assuming that the Circuit Court of Appeals had jurisdiction to render a decree in these circumstances, did it properly exercise its judicial power in issuing a decree enjoining the proffer of evidence at a hearing before a trial examiner of an administrative agency on the ground that the evidence is not relevant to the issues to be determined at the hearing?

STATUTES INVOLVED

The statutory provisions involved in this case are Section 262 of the Judicial Code and Sections 209, 301 (c), 307, 311, and 313 of the Federal Power Act, which are printed in the Appendix, *infra,* pages 26–31.

STATEMENT

Acting on its own motion the Federal Power Commission on January 6, 1936, undertook an investigation into the ownership, operation, manage-

ment, and control of the respondents and into contracts and working arrangements between the respondents and their affiliates (R. 23). This investigation was undertaken under the authority of Sections 301 (c), 307, and 311 of the Federal Power Act.

The Commission issued an "order of inquiry" to respondents directing them to make available for the examination of the Commission's representatives their books, accounts, memoranda, and records, and also the books and papers of their affiliates (R. 23–24). The respondents complied with this order in part, but denied to the Commission's representatives access to the books and papers of certain persons, whom respondents claimed were non-affiliates (R. 42–45). The information gathered by the Commission's representatives was embodied in a report to the Commission, dated December 10, 1936 (R. 2, 45).

In order to obtain the information refused to the Commission's representatives, the Commission, on January 26, 1937, issued an order and notice of a joint hearing to be held on March 3, 1937, before the Federal Power Commission and the Pennsylvania Public Service Commission as expressly authorized by Section 209 (b) of the Federal Power Act (R. 25). The object of this hearing was to ascertain the facts relating to: (1) the ownership, operation, and management of respondents; (2) contracts and working arrangements between re-

spondents and their affiliates; and (3) expenditures made and obligations incurred under such contracts and working arrangements which in any way affected or related to the business of respondents (R. 25). The order and notice of hearing included a paragraph directing respondents and certain designated affiliates, with whom respondents had business transactions during 1934 and 1935, to appear at the hearing and present certain specified information concerning the organization and ownership, in order to determine the extent to which respondents and the designated affiliates were in fact under common control (R. 27).

On February 23, 1937, before the date set for hearing, respondents, purporting to act under Section 313 (a) of the Federal Power Act, filed a so-called "Petition for Rehearing," seeking to vacate the order of January 26, 1937, for want of jurisdiction over some of the parties and over the subject matter of investigation (R. 13). The Commission continued *sine die* the order and notice of hearing of January 26, 1937 (R. 29, 35), thereby relieving the respondents and the designated affiliates from appearing and producing the information requested on March 3, 1937.

On March 23, 1937, the Commission, treating the so-called "Petition for Rehearing" as a plea to the Commission's jurisdiction, granted the same and set the matter for hearing (R. 47, 49). At the hearing before an Examiner, which commenced on

April 14, 1937, respondents introduced evidence tending to establish that the purpose of the Commission in adopting the order of January 26, 1937, was to obtain information to aid the Pennsylvania Public Service Commission and that three of the respondents were engaged wholly in intrastate business (R. 6). At the conclusion of the presentation of this evidence by respondents, the Commission's counsel introduced evidence tending to establish the jurisdiction of the Commission over the respondents in this inquiry (R. 47–48). The purpose of counsel in introducing evidence was to establish that all of the respondents were public utilities within the meaning of the Federal Power Act or licensees of the Federal Power Commission, that respondents had entered into certain transactions or working agreements with the persons and companies designated as affiliates of respondents in the order of January 26, 1937, and that the respondents and designated affiliates were under common control (R. 48). The establishment of these facts was essential to the exercise of the power vested in the Commission by Section 301 (c) of the Federal Power Act. Respondents objected to the admissibility of certain evidence on the ground that such evidence was not relevant to the issues presented by the so-called "Petition for Rehearing," but related to matters which they contended might come more properly within the order of January 26, 1937 (R. 6–7). This objection was overruled by the Examiner

with full explanation (R. 8, 30–34).[1] Thereupon respondents applied to the Commission for instructions to be given to the Examiner to confine the testimony in the hearing solely to matters raised by the so-called "Petition for Rehearing" and to define the issues to be determined by the Examiner during the course of that hearing (R. 9, 29–35). On April 20, 1937, the Commission denied the request for the reason that under its rules of practice it was within the functions of the Examiner to rule upon the admissibility of evidence (R. 9). Upon remand to the Examiner he again ruled against the respondents (R. 9).

On April 21, 1937, respondents filed a petition in the United States Circuit Court of Appeals for

[1]The order of the Commission granting the so-called "Petition for Rehearing" (R. 4) also assigned "the matters involved in this proceeding for hearing." Respondents interpreted this assignment for hearing as limited to the issues raised in the so-called "Petition for Rehearing," as distinguished from the investigation. The Examiner interpreted the assignment to relate to the questions raised by respondents, together with any other matters which related to the power of the Commission to issue the order of January 26, 1937. The sole question, therefore, was one of the admissibility of evidence. Respondents in effect said that certain designated respondents were not public utilities within the meaning of the Federal Power Act and that therefore the Federal Power Commission was without authority to examine their books and papers or those of their affiliates. The ruling of the Examiner was to the effect that the Commission must look into the business of these respondents and their books and papers in order to ascertain whether respondents were or were not public utilities and whether they had any business transactions with the designated affiliates (R. 33–34).

the Third Circuit praying for a rule to show cause and for a stay of proceedings before the Federal Power Commission (R. 1). The respondents contended that the Commission should be required to limit the pending hearing solely to the jurisdictional question upon which the respondents had introduced evidence (R. 12). The Circuit Court of Appeals on July 6, 1937, issued the rule as prayed (R. 36). The Commission, having made a return to the rule on September 21, 1937, prayed that the rule be discharged, the stay of the proceedings terminated, and the petition dismissed (R. 40–49).

On January 27, 1938, the Court of Appeals, one judge dissenting, rendered its decision (R. 50) restraining the Commission from proceeding with its proposed inquiry and investigation until the "two issues raised" in the so-called "Petition for Rehearing" had been decided by the Commission. By way of direction to the Commission, the majority opinion states: "The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material" (R. 53). The majority opinion of the court below held in effect that the order of January 26, 1937, was an appealable order under Section 313 (b) of the Federal Power Act and that it possessed appellate jurisdiction under Section 262 of the Judicial Code to protect its jurisdiction

to review such order. The cause was ordered "remanded" to the Commission, although the case had not come to the Court of Appeals on appeal. The dissenting opinion of Judge Biggs (R. 54–62), after a review of pertinent decisions not adverted to in the majority opinion, concluded that the order of January 26, 1937, was not an appealable order; that hence there was at this time no appellate jurisdiction to protect under Section 262 of the Judicial Code; that the court therefore was without power to issue an injunction; and that the result of the decision sanctioning judicial intervention in administrative proceedings would be to "emasculate the Federal Power Act and render the Commssion unable to pass upon the very matters for which it was created" (R. 59).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that an interim or procedural order, interlocutory in its nature, is a reviewable order under the provisions of Section 313 of the Federal Power Act.

2. In holding that Section 262 of the Judicial Code conferred authority on the court to grant the relief prayed for.

3. In supervising the proffer of evidence in the course of an administrative hearing before the Federal Power Commission and in limiting the issues upon which evidence might be received.

4. In failing to hold that respondents had a plain, adequate, and complete remedy at law, and that their administrative remedies had not been exhausted.

5. In failing to dismiss respondents' petition.

SUMMARY OF ARGUMENT

1. The court below was without jurisdiction. The "all writs" section of the Judicial Code (Sec. 262), under which respondents sought an injunction, has no application. No appellate jurisdiction of the Court of Appeals with respect to the matter in controversy exists. The order of January 26, 1937, setting down an investigation for hearing, is an interim procedural order, not final, and not appealable. So far as appears, the investigation will not even culminate in an appealable order. In the guise of attempting to protect a nonexistent appellate jurisdiction of the court, respondents are seeking to prevent the presentation of evidence in an administrative hearing upon which the Commission may determine its jurisdiction over respondents.

2. Even if an appealable order existed, so as to create prospective appellate jurisdiction in the court below, the granting of injunctive relief was an abuse of power. Such intervention in the course of an administrative hearing is a departure from established principles of judicial administration, recently restated by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, decided January

31, 1938. There were no considerations to justify this extraordinary action. If there is any disadvantage to respondents from the mere reception of the evidence proffered, it is an ordinary incident of litigation. The Commission, however, is prevented from developing a record which it deems necessary for the intelligent determination of its own jurisdiction over respondents. The inappropriateness of such intervention is reflected in the character of the decree below, which sets forth so vague a requirement as to the relevancy of evidence admissible before the examiner that the Commission cannot know whether it is acting in accordance with or in disobedience to the injunction.

ARGUMENT

I

THE COURT BELOW WAS WITHOUT JURISDICTION, SINCE THERE WAS NO APPEALABLE ORDER AND HENCE NO APPELLATE JURISDICTION IN AID OF WHICH THE DECREE BELOW COULD BE ISSUED

The injunction obtained in the case at bar was not sought to protect respondents against the compulsory production of evidence. It was sought to limit the scope of the hearing then in progress before an examiner of the Federal Power Commission, and specifically to limit the reception of evidence proffered by officers of the Commission.

The respondents' petition to enjoin the hearing before the Examiner was presumably based, as

stated in the dissenting opinion of Judge Biggs, on Section 262 of the Judicial Code (U. S. C., Title 28, Sec. 377). That section authorizes the Federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." It is submitted that the court below was without jurisdiction, because the writ sought was not in aid of any appellate jurisdiction of the court.

There was no appeal pending in the Circuit Court of Appeals when the petition of respondents was filed there. Nor has any appeal subsequently been taken. The assumption on which respondents have proceeded is that the order and notice of hearing of January 26, 1937, was an order from which an appeal would lie to the Circuit Court of Appeals under Section 313 (b) of the Federal Power Act. But that assumption, we submit, is erroneous, and hence respondents' case should have been held by the Court of Appeals to fail at the outset.

The order of January 26, 1937, was an initial, not a final, order, and so cannot be regarded as appealable under Section 313 (b) of the Act. The Act, in providing for an appeal from "an order" of the Commission, indicates that orders which are merely interlocutory or procedural, entered properly without prior hearing, based on no record, and embodying no judgment cannot be reviewed on appeal to a Circuit Court of Appeals.

The Act provides, in Section 313, prescribing the requirements for appeal, that the Commission must certify and file with the court a "transcript of the record" upon which the order complained of was entered; that the "findings" of the Commission as to the facts, if supported by substantial evidence, shall be conclusive; that "additional" evidence may be adduced before the Commission upon leave of court if there were reasonable grounds for failure to adduce such evidence theretofore. These provisions of the statute must be ignored if mere interim, procedural, or interlocutory orders of the sort here involved, setting down for hearing a question of jurisdiction in the course of an investigation, can be reviewed on direct appeal to a Circuit Court of Appeals.[2]

The holding of the majority of the court below, that the order could be appealed, ignores also the settled course of decisions governing appealabil-

[2] In their brief in opposition (p. 19) respondents misstate the basis of the decision in *American Sumatra Tobacco Corp.* v. *Securities & Exchange Commission*, 93 F. (2d) 236 (App. D. C.). That case held that an order of the Securities and Exchange Commission denying an application for confidential treatment of certain data in a registration statement was appealable. As a basis for its decision that court ruled that a hearing was necessary to support such an order, and that hence the statutory requisites for appealability were present. Without conceding the correctness of that decision, it is manifestly inconsistent with respondent's contention in the present case, for here confessedly no prior hearing was required to support the order of January 26, 1937, and the so-called petition for rehearing could have been denied summarily.

ity of both judicial and administrative orders. It is clear that, except where specific statutory exception is made, an appellate court will not review interlocutory rulings made during the course of proceedings in an inferior court. *McLish* v. *Roff*, 141 U. S. 661. The reasons for this rule in the case of judicial proceedings were stated in *American Construction Company* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372. To review by mandamus a ruling or interlocutory orders made in the course of a trial would, the Court said (p. 379):

> * * * "be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for re-examination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

With respect to orders of administrative agencies which are not final, the reasons for non-reviewability are even more compelling. To review such orders would involve pervasive supervisory power over administrative matters and the assumption of administrative functions, and would set at naught the rule that administrative remedies must be exhausted before resort may be had to the courts.

Porter v. *Investors' Syndicate,* 286 U. S. 461. These principles have had frequent application.

In *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, the Circuit Court of Appeals for the Eighth Circuit was asked to set aside an order of the Federal Trade Commission denying motions to dismiss a complaint set down for hearing before the Commission. That court said (p. 48):

> It is our judgment that neither the District Court nor this court has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside.

Likewise, in *Jones* v. *Securities and Exchange Commission,* 79 F. (2d) 617 (C. C. A. 2d), the Circuit Court of Appeals dismissed for want of jurisdiction an appeal from an order of the Commission denying permission to withdraw a registration statement although the statute granted a right of review to "any person aggrieved by an order of the Commission." This Court denied certiorari, 297 U. S. 705, on the same day that it granted certiorari in a companion case arising out of an order of the District Court requiring obedience to a subpena, 297 U. S. 699. In deciding the latter case this Court held (298 U. S. 1) that the petitioner had a right to withdraw his registra-

tion statement filed with the Securities and Exchange Commission. When that question had been sought to be reviewed on direct appeal to the Court of Appeals from the Commission's ruling, however, the appeal was properly dismissed for want of jurisdiction. See also *Securities & Exchange Commission* v. *Andrews*, 88 F. (2d) 441 (C. C. A. 2d).

Again, in *Ames-Baldwin-Wyoming Company* v. *National Labor Relations Board*, 73 F. (2d) 489 (C. C. A. 4th), petitioner sought to review an order of the National Labor Relations Board (organized under Act of June 19, 1934, c. 677, 48 Stat. 1183), whose orders were subject to review by the Circuit Courts of Appeals in the same manner as the orders of the Federal Trade Commission. In that case the Board ordered petitioner to hold an election to determine the proper representation of its employees. The order concluded with the warning that if the petitioner did not comply, the matter would be referred to the Compliance Division of the National Recovery Administration. Since further action by an administrative agency had to be taken before the order became final, the Circuit Court of Appeals dismissed the petition for want of jurisdiction.

Where the administrative order relates to the initiation or progress of a hearing, the allowance of an appeal violates traditional canons of judicial administration. Those canons have recently been restated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, decided January 31,

1938, No. 181. As was there observed, attempts to enjoin administrative hearings on the ground of want of jurisdiction, needless burden and expense, and injury to credit and goodwill have repeatedly been rejected. See also *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160; *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5th); *Macfadden Publications* v. *Federal Trade Commission,* 37 F. (2d) 822 (App. D. C.); *Minneapolis Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A. 8th). It is not to be supposed that Congress intended a different result to be reached under the Federal Power Act.

The court below regarded the words "an order" in Section 313 as equivalent to "any order." But even where the latter term is employed, as in the provision of the Urgent Deficiencies Act of 1913 giving jurisdiction to the District Courts to set aside "any order" of the Interstate Commerce Commission, many kinds of orders are not reviewable. There is no jurisdiction to review orders which are in effect findings of fact, *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299; or orders which are negative in character, *Procter and Gamble* v. *United States,* 225 U. S. 282, or orders which affect only the carrier and not the shippers or a large part of the public, *United States* v. *Griffin and Purvis, Receivers,* decided February 28, 1938, No. 63.

Particularly relevant are the decisions holding

non-reviewable under the Urgent Deficiencies Act orders instituting a proceeding. In *United States* v. *Illinois Central Railroad Co.*, 244 U. S. 82, the Interstate Commerce Commission assigned for hearing certain complaints filed with it. Suit was brought under the Urgent Deficiencies Act to set aside, annul, or suspend the order of the Commission. It was argued that the Commission lacked jurisdiction to hold the hearing, that the company would be subjected thereby to needless burden and expense, and that an order of reparation entered at the conclusion of the hearing would constitute *prima facie* evidence in suits brought against the carrier on the basis of the awards. Despite these contentions, this Court held that the order was not reviewable. The *Illinois Central* case was followed in *New York, O. and W. Ry. Co.* v. *United States*, 14 F. (2d) 850, so as to preclude review of an order of the Commission reopening a valuation proceeding in respect of items therein never objected to by the carrier. Despite the question raised as to the authority of the Commission, and the allegations of burden and expense to the railroad, the court held that review did not extend to orders "relating to practice or procedure" (p. 851). This decision was affirmed *per curiam* in 273 U. S. 652.

In addition to the fact that the order of January 26, 1937, is merely interlocutory and procedural, and hence not appealable, it may be questioned whether it is an order in a "proceeding" within the meaning of Section 313 of the Act. The order was

entered in an investigation which for aught that appears would not even culminate in an appealable order. Cf. *United States* v. *Los Angeles R. R. Co.*, 273 U. S. 299.

Respondents invoked the extraordinary power of the court below in aid of an appellate jurisdiction which does not exist. No rights of respondents which are entitled to judicial protection will become "moot", as the court below thought. The only right which respondents can suggest will become moot is the supposed right to prevent the reception of evidence deemed to be irrelevant. In short, respondents contest the power of the Commission to hold the hearing set by the order of January 26, 1937, or to present any evidence therein; the compulsory feature of the order, requiring attendance with books and records, is not the object of attack. If it were, the answer would be the same, for the statute provides special procedures for the enforcement of subpenas and does not contemplate appeals from the issuance thereof to the Circuit Courts of Appeals.[3] See *Myers* v. *Bethlehem Ship-*

[3] Upon refusal to produce the information required, the Commission may, under Section 307 of the Act, apply to any court of the United States, within the jurisdiction of which the investigation is carried on, or where the respondents reside or do business, for an order requiring respondents to give information. Failure to obey such order of the court may be punished by the court as a contempt thereof. The statute further provides that if the Commission issues a subpena and the respondents willfully refuse to obey it, they may be subjected to a fine of $1,000 per day, or, in the case of natural persons, to an imprisonment. Having provided these remedies, Congress evidently

ping Corp., decided January 31, 1938, No. 181. The insistence of respondents that they may forestall the reception of evidence at an administrative hearing in order to preserve the appellate jurisdiction of the Court of Appeals, exposes the utter frivolousness of their case; for their case rests on the notion that the mere setting down of a matter for an investigatory hearing constitutes an appealable order. Such a notion, it appears, has found judicial acceptance for the first time in the decision below.

II

IF THE COURT BELOW HAD JURISDICTION, THE GRANTING OF THE INJUNCTION WAS AN ABUSE OF POWER

Even if the order of January 26, 1937, was an appealable order, so that prospective appellate jurisdiction existed, the intervention of the court below in the progress of an administrative hearing is unsupportable. Such intervention, in the words of Section 262 itself, is not in accord with "the usages and principles of law." This statutory limitation on the power of the court to issue extraordinary writs is of special importance in emphasizing the gravity of the decision below.

The canons of judicial administration, recently restated, as observed above, in the *Bethlehem Shipbuilding Corp.* case, forbid the granting of an in-

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did not intend that an order requiring testimony or information in an investigation should be subject to review under Section 313 (b) of the Act.

junction to control the proffer and reception of evidence in an administrative hearing. As was said in *Minneapolis Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (C. C. A. 8th), *supra* (p. 47):

> It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recommendation submitted, then it has, in effect, been constituted an original trial tribunal of controversies of this nature. This was in no wise contemplated, nor would it comport with the legimate practical functions of a court of this nature.

The decree below stands, then, as an invasion of the administrative functions of the Commission in supervising the reception of evidence before an examiner. As Judge Biggs observed in his dissenting opinion, "For this court to pass upon such questions during the pendency of a hearing before the Commission is to compel us in effect to sit with the Commission throughout every phase of its inquiry" (R. 59). Such intervention is not only a departure from established principles of judicial administration but raises further questions going to the character of the judicial power conferred by Article III of the Constitution. Cf. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464.

The soundness of the principles which prevent such intervention is attested by the character of the decree herein. The vagueness and indefiniteness of the decree would appear to make it fatally defective under the ordinary rules of equity practice. U. S. Code, Title 28, Sec. 383. Cf. *Landis* v. *North American Co.*, 299 U. S. 248, 253–254. The court also failed to enter findings and conclusions under Equity Rule 70½, though requested to do so by the Commission (R. 63). The vagueness of the decree serves to place in jeopardy an important function of an administrative agency of the Government. The decree recites (R. 62) that the cause is "remanded" to the Commission "for determination in accordance with the opinion of this Court." The opinion states (R. 53) that the evidence admitted should be "strictly confined" to the two issues raised in the petition for rehearing, and that the relation of the evidence to those questions "should be apparent and logical and not far-fetched and remotely inferential." "Some of the evidence admitted," the court added, "was not relevant and material." It is not stated in explanation of the "strict" limitation whether the rules of evidence to be applied should be those applicable to administrative agencies, or to suits in equity, or to jury trials. Nor is it indicated whether a judgment as to admissibility may be affected by the harmless character *vel non* of the proffered evidence. Furthermore, views of strict relevancy may legitimately differ in the circumstances here presented.

For example, if the respondents introduce evidence to show that in accordance with the stock relationships between two corporations, they are not affiliates and, therefore, the Commission has no right to inquire into the book transactions relating to sales, is it competent for the Commission to consider evidence showing that the book transactions are such as would counterbalance the formal evidence concerning stock relationships in determining the affiliations of the two corporations? It is evident that these difficulties may be multiplied, and the only manner in which the Commission may be certain that it is not disobeying the injunction of the Circuit Court of Appeals would be to invite that court to sit with the Commission's Examiner and exercise its veto power on each ruling on admissibility of evidence. Otherwise, the door would be left open to numerous appeals to the Circuit Court of Appeals from rulings of the Examiner, with the result that the investigation on these very jurisdictional questions would be extended indefinitely.

No interest of respondents justified the extraordinary action of the court below. At the very most, their contention is that they are entitled to be free from the presentation of evidence to the Commission by its own officers, with full opportunity to explain or rebut the evidence and reserve exceptions to its relevance.[4] Nowhere in the pleadings

[4] The operation of the subpena in paragraph 2 of the order was indefinitely suspended (R. 29, 35). And in any event, any question as to the validity of the subpena could

below did respondents attempt to show the nature or extent of the damage that would result from such reception of evidence.

The Commission, on the other hand, is engaged in the exercise of important investigatory duties, placed upon it by the statute, in a preliminary effort to determine facts. In the Federal Power Act, Congress adopted a comprehensive scheme for the regulation and control of public utilities engaged in interstate commerce and, in addition to the regulatory functions delegated to the Commission, Congress also found it necessary to authorize and direct the Commission to investigate licensees and public utilities subject to the Federal Power Act.

Section 301 (c) provides that the books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility, and of any other company controlled by such persons insofar as they relate to transactions with, or the business of such licensee or public utility, shall be subject to examination on the order of the Federal Power Commission. Section 307 (a) authorizes the Commission to investigate any facts, conditions, practices, or matters which it may deem necessary or proper in order to determine whether any person has violated, or is about to violate, any provision of the Federal Power Act,

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be raised in a proceeding at law with all appropriate safeguards if and when it was sought to be enforced. *Federal Trade Commission* v. *Claif Furnace Co.*, 274 U. S. 160; *National Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 309–310.

or any rule or regulation or order thereunder. By Section 311 of the Act, Congress authorized and directed the Commission to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, and to secure and keep current information regarding the ownership, operation, management, and control of all facilities for the generation, transmission, distribution, and sale of electric energy.

These and other investigatory powers and functions have been vested by Congress in the Federal Power Commission because such investigations are necessary in the public interest. The importance of this interest far overbalances the ephemeral or imaginary harm which might come to the respondents by disclosure of the information which the Commission sought to consider.

For the reason that important questions of jurisdiction must be decided in the first instance by the Commission, it is particularly necessary that the Commission have an opportunity to base its determination of such questions on an adequate record. Evidence intended to disclose complex corporate interrelationships is of especial relevance in this regard. These questions of jurisdiction will doubtless come before the courts at some later time in an appropriate proceeding. From the standpoint of the courts no less than of the Commission it would be unfortunate if the decision of the Commission on those questions were required to be made upon the basis of a hearing truncated by judicial decree.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the cause remanded with directions to dismiss.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
PAUL A. FREUND,
ROBERT M. COOPER,
Special Assistants to the Attorney General.
OSWALD RYAN,
General Counsel,
WILLIAM C. KOPLOVITZ,
Assistant General Counsel,
LAMBERT MCALLISTER,
GREGORY HANKIN,
Federal Power Commission,
Of Counsel.

MAY 1938.

APPENDIX

Judicial Code, Section 262 (U. S. C., Title 28, Sec. 377):

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.)

Federal Power Act, c. 687, 49 Stat. 803 (U. S. C. Sup. II, Title 16, Sec. 825):

> SEC. 301. (c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, in so far as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.
>
> * * * * *
>
> SEC. 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in pre-

scribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspond-

ence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

* * * * *

SEC. 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political sub-

division of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

* * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions

as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

Respondents' Reply to Motion of Federal Power Commission to Shorten Time for Filing Brief and to Advance Case for Argument

WALTER BIDDLE SAUL,
Packard Building,
Philadelphia, Pa.,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
61 Broadway, New York City,

SAUL, EWING, REMICK & SAUL,
Packard Building,
Philadelphia, Pa.;
Of Counsel.

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Respondents.

Respondents' Reply to Motion of Federal Power Commission to Shorten Time for Filing Brief and to Advance Case for Argument

The respondents, METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY, file the following answer to the motion of the FEDERAL POWER COMMISSION (hereinafter called the "Commission"), seeking that the time for respondents to file their brief in answer to the Commission's petition for the issuance of a

writ of certiorari be shortened, and that the case be advanced for argument on Monday, May 2, 1938:

1. The cause did not arise in the manner set forth in the motion. Hearings in the course of the Commission's investigation, referred to in said motion made on its behalf by the Solicitor-General, had been *adjourned by the Commission without day* well prior to the institution by the respondents of the proceedings in the Circuit Court of Appeals, and were *not* the subject of the proceedings in that Court. The particular issue before the court below, the decision on which is the subject of the petition for a writ of certiorari in this case, was the right of the Circuit Court of Appeals to protect its general appellate jurisdiction over Commission orders vested in it by the Federal Power Act and whether such jurisdiction was being destroyed by certain Commission action.

2. The issue below was raised by a petition of the respondents to the Circuit Court of Appeals which showed that the respondents were attempting to pursue their administrative remedy provided for in the Federal Power Act against a certain order of the Commission, but that such administrative remedy was being frustrated and the appellate jurisdiction of the Circuit Court of Appeals was being destroyed by the Commission's refusal to follow the administrative procedure laid down by the Act.

3. The record of the proceedings before the Commission was and is the best evidence of its conduct complained of. This record was made on a rehearing granted by the Commission on a Petition for Rehearing filed by respondents with it with respect to an order made by it. The Federal Power Act requires as a prerequisite to a review by the Circuit Court of Appeals of an order of the

Commission that such a Petition for Rehearing thereon be filed with the Commission.

4. At the hearing in the Circuit Court of Appeals on the return day of the Rule issued to the Commission to show cause why it should not be restrained from proceeding in such manner as destroyed both respondents' administrative remedy and their ultimate right of appeal provided by the Act of Congress, the respondents offered in evidence the record that had been made before the Commission, which contained the testimony taken before the Commission, the rulings of the Examiner on behalf of the Commission, the rulings of the Commission on the questions of procedure, and the statements by counsel for the Commission of what the Commission proposed to do upon the hearings.

5. When that record was offered in evidence, its admission in evidence was objected to by counsel for the Commission, but, after extended argument, the Commission's objections were overruled and the record was admitted in evidence by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals affirmatively shows that it was on the basis of this record that its decision was made.

6. The Clerk of the Circuit Court of Appeals for the Third Circuit, in certifying to the Clerk of this Court the record of the court below, included therein the record made before the Commission, which, as above set forth, had been duly offered, and admitted in evidence by the Circuit Court of Appeals.

7. The Commission has failed to print that record; and in the motion filed in this Court, to which this is

a reply, it is stated: "* * * the testimony before the Commission was not part of the record in the Circuit Court of Appeals and therefore is not part of the record in this Court or required to be printed as such." *Your respondents respectfully but firmly aver that that statement in the Commission's motion is not correct.*

8. Respondents have annexed hereto as Exhibit A and made a part hereof a certificate of the Circuit Court of Appeals, dated April 23, 1938, setting forth that the record of proceedings before the Federal Power Commission was admitted in evidence by the Circuit Court of Appeals, and was considered by the Court in its order.

9. Whether the order of the Circuit Court of Appeals should or should not be sustained depends upon a consideration of the record which was in evidence before that Court, and upon the question of whether or not that record shows that the course of proceeding by the Commission therein disclosed had the effect of destroying the respondents' administrative remedy before the Commission, and of destroying and making moot the appellate jurisdiction of the Circuit Court of Appeals vested in it by the Federal Power Act.

10. Prior to the filing of their petition, verified April 20, 1938, and supported by affidavits, requesting an extension of time to answer the Commission's petition for certiorari (to which respondents refer for the reasons for such extension), respondents, through their counsel, communicated with the General Counsel for the Commission, Oswald Ryan, Esq. and its Assistant General Counsel, William C. Koplovitz, Esq., in order that the question of the content of the record might be settled by a proper

stipulation. Mr. Ryan agreed that the record before the Commission had been offered in evidence at the hearing before the Circuit Court of Appeals and that the consideration of that record was essential in so far as the determination of the rights of the respondents were concerned. Mr. Ryan stated, however, that the matter was in the hands of the Solicitor-General's office. Mr. Koplovitz stated that he would take up the matter with the Solicitor-General's office so that a proper stipulation might be agreed upon. Counsel for the respondents had theretofore called to the attention of the Solicitor-General's office the fact that the record was incomplete. After the conference with Messrs. Ryan and Koplovitz, counsel for respondents wrote to Mr. Cooper, in charge of the matter in the Solicitor-General's office, a letter dated April 21, 1938. Copies of said letter and of the Solicitor-General's telegraphic reply thereto received on April 22, 1938, are annexed hereto as Exhibits B and C hereof.

11. Respondents deny the averments in the Commission's motion with respect to the public importance or gravity of the decision of the Court below; deny the assertion that its effect is unsettling upon the principles governing the review of administrative action; deny that such decision results in any confusion or otherwise materially interferes with the administration of the Federal Power Act; and deny that the decision below jeopardizes in any way the progress of any investigation properly undertaken by the Commission. Respondents have confined themselves herein to this brief denial because these are matters which are not before this Honorable Court on the instant motion, but are only properly raised by the petition for

certiorari. They will be discussed and fully answered in respondents' brief in answer to the petition for such writ.

12. Respondents deny that their petition for an extension of time to file an answering brief was filed for the purpose of delaying an early determination by this Court or to delay proceedings before the Federal Power Commission. Respondents respectfully point out to this Court that the judgment of the court below was filed on January 27, 1938 and that it was not until April 1, 1938, more than two months thereafter, that the petition for certiorari was filed. Respondents further respectfully point out that if a proper transcript of record had been caused to be printed and filed with the petition for certiorari, there would have been no necessity to apply for additional time within which the defect in the transcript might be rectified by the Commission.

13. Respondents suggest that, in view of the facts that the record herein is still defective, and that this Honorable Court has not as yet had opportunity to exercise its discretion with respect to the Commission's petition for certiorari, nor to consider respondents' answering brief (which will point out some of the many erroneous assumptions of fact and law contained in the petition), the Commission's motion that the case be advanced for argument on Monday, May 2, 1938, is at least premature. In any event, respondents respectfully state that neither the petition for certiorari nor the Commission's motion show any facts requiring the suspension of the rules of this Court to respondents' prejudice—which the granting of such motion would entail.

14. Your respondents therefore respectfully pray that this Honorable Court dismiss the motion of the Federal Power Commission.

And your petitioners will ever pray.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY, Respondents,

By (Sgd.) WALTER BIDDLE SAUL,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

Commonwealth of Pennsylvania }
County of Philadelphia } ss.:

WALTER BIDDLE SAUL, being duly sworn, deposes and says: that he is an attorney at law, admitted to the bar of the Supreme Court of the United States; that he is counsel for the respondents herein; that he has read the foregoing answer of the respondents and knows the contents thereof; and that the same are true to the best of his knowledge and belief.

(Sgd.) WALTER BIDDLE SAUL

Sworn to before me this 23rd }
day of April, 1938. }

(Sgd.) L. C. STURTEVANT
Notary Public
My Commission Expires Feb. 26, 1939

(NOTARIAL SEAL)

Exhibit A

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, and SOLAR ELECTRIC COMPANY

Certificate

AND NOW, to wit, April 23, 1938, upon motion of Walter Biddle Saul, counsel for the respondents, the Circuit Court of Appeals of the United States for the Third Circuit, hereby certifies that the record of the hearings before the Federal Power Commission were offered in evidence before this court and admitted in evidence and the said record was considered by this court in the order which it made in disposing of the petition of the Metropolitan Edison Company, et al, and the said record of the proceedings before the Federal Power Commission were certified to the United States Supreme Court by the Clerk of this court as part of the record which was before this court.

PER CURIAM
(Sgd.) BUFFINGTON
Senior Circuit Judge

Received & Filed, April 23, 1938
WM. P. ROWLAND,
Clerk

Exhibit A (Cont'd)

UNITED STATES OF AMERICA
Eastern District of Pennsylvania } Sct.
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Certificate of the Court as to Record in the case of—

Metropolitan Edison Co., et al.,
Petitioners,

vs

Federal Power Commission,
Respondent

No. 6447

on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 23rd day of April, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the United States the one hundred and sixty-second.

(SEAL)

(Sgd.) WM. P. ROWLAND
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

Exhibit B

SAUL, EWING, REMICK & SAUL
2301-17 Packard Building
Philadelphia, Pa.

April 21, 1938

Dear Mr. Cooper:

In the matter of the application of the Federal Power Commission for a certiorari to the Supreme Court from the Third Circuit, I would like to have a conference with you as soon as possible, either in Philadelphia or Washington, in order to prepare a stipulation that will clear up the question of the record. On Tuesday I talked to Mr. Ryan and Mr. Koplovitz, and they agreed with me that the testimony that had been taken before the Federal Power Commission had been offered in evidence in the Circuit Court of Appeals, admitted in evidence by the Circuit Court of Appeals and was part of the record. Mr. Ryan also agreed with me (Mr. Koplovitz not having been in the case at that time) that a consideration of that testimony was essential to the proper presentation of the case. Mr. Banigan and I suggested a stipulation in event that your department still feels that for the time being it did not desire to spend the money for printing of the record, that would provide:

1. A definite agreement that the testimony now filed with the Clerk of the United States Supreme Court was part of the record and was to be considered by the court in passing on the petition for a certiorari.

2. That in any answer and/or brief that the respondents desire to file this testimony could be referred to as though it had been printed.

3. That in event the Supreme Court granted a writ of certiorari the government would print the testimony as part of the record so it would be available in convenient form for the use of the court on the argument.

As the court granted only an additional ten days to file our answer to the petition and as our answer must be printed, I would appreciate it if you would let me know when I could talk the matter over with you so that the stipulation could be put in form and signed in time to permit the respondents to file their answer and brief before the expiration of the ten day period.

Very truly yours,

(Sgd.) WALTER BIDDLE SAUL.

WBS:S

Department of Justice
Washington, D. C.

Exhibit C

RECEIPT ACKNOWLEDGED YOUR LETTER ADDRESSED TO MR. COOPER. SEE NO OCCASION FOR CONFERENCE WHICH YOU SUGGEST PARTICULARLY IN VIEW OF REPRESENTATION WHICH YOU HAVE MADE TO THE COURT IN APPLICATION FOR EXTENSION OF TIME. WITH RESPECT TO YOUR FIRST PROPOSITION THE ANSWER IS NO. WITH RESPECT TO YOUR SECOND PROPOSITION THE DEPARTMENT HAS LONG SINCE INDICATED THAT THEY WOULD BE WILLING TO ENTER INTO SUCH A STIPULATION. WITH RESPECT TO YOUR THIRTY [THIRD] PROPOSITION THE ANSWER IS NO.

(Sgd.) ROBERT H. JACKSON
SOLICITOR-GENERAL

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

WALTER BIDDLE SAUL,
Packard Building,
Philadelphia, Pa.,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
61 Broadway, New York City,

SAUL, EWING, REMICK & SAUL,
Packard Building,
Philadelphia, Pa.,
Of Counsel.

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Respondents.

RESPONDENTS' BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The respondents are six Pennsylvania operating public service companies. They were, and still are, respondents in an investigation proceeding heretofore instituted by the Federal Power Commission (the petitioner here, hereinafter termed the "Commission") in which the Commission made certain orders which are considered later. Respondents were the petitioners in the Circuit Court of

Appeals for the Third Circuit and there obtained certain relief against the Commission, *which in no way affected the validity of the Commission's orders.* The investigation is still pending; having been *adjourned without day by the Commission.* The real issues of fact and law between the respondents and the Commission are still pending undecided before the Commission. The Court below did not in any way pass on those issues; but, on the contrary, preserved them for determination as real, live issues, as distinguished from moot or academic ones.

Questions Presented

A brief sketch of the facts,* later amplified, is sufficient to make intelligible the sole questions which were before the Circuit Court of Appeals, and which are now sought to be presented here:

In January, 1936, the Federal Power Commission instituted an investigation directed to respondents. On January 26, 1937, the Commission issued an order in furtherance of that investigation, by which order respondents deemed themselves aggrieved. In pursuit of their administrative remedy,** and as an essential statutory prerequisite** to a court review of that order, the respondents filed with the Commission a Petition for Rehearing, raising objections that the Commission lacked any fundamental or primary jurisdiction or power to make the order and conduct the investigation in pursuance thereof. Among its various other mandates, the questioned order of Janu-

* The facts are summarily restated in this brief because of distortions and erroneous assumptions contained in the statement thereof in the Commission's petition.

** Federal Power Act, Sec. 313.

ary 26, 1937, directed a hearing to be held. **The Commission adjourned that hearing without day; granted the Petition for Rehearing** and fixed a date for the hearings **under** the Petition for Rehearing. On that rehearing, despite all of petitioners' objections, the Commission proceeded to **assume and exercise** the jurisdiction which the Petition for Rehearing asserted it lacked, and proceeded to carry forward the very investigation under its questioned order exactly as if no administrative or court review thereof was sought, as if the hearing thereunder had *not* been adjourned without day, and as if no rehearing thereon had been granted. Furthermore, it was made plain that the Commission intended to continue this course of conduct.

To have completed the investigation under the guise of a rehearing would have destroyed respondents' administrative remedy and would have rendered moot any decision thereafter to be made on any review by the Circuit Court of Appeals as to the *power* to investigate. Respondents thereupon petitioned that Court to assert its powers under Section 262 of the Judicial Code (the "all writs" section), and to restrain the course of conduct deliberately followed and to be followed by the Commission, whereby the appellate jurisdiction of the Court would have been nullified and deliberately destroyed by the Commission's action.

Thus were presented two, and only two, questions to the Court below—the only questions on the decision of which the Commission can seek review through a writ of certiorari:

1—Did the Court of Appeals have general appellate jurisdiction to review the Commission's order of January 26, 1937?

2—If appellate jurisdiction existed, was the conduct of the Commission so destructive thereof that the Court should act under Section 262 of the Judicial Code to protect its appellate jurisdiction?

The first question is one of law; the second a question of fact.

Statutes Involved

The only statutes involved are Section 262 of the Judicial Code (USC, Title 28, §377) and Sections 313, 315 and 316 of the Federal Power Act (USC, Title 16, §825 l, n, and o).

The Facts

The petition for certiorari assumes as true and established so many facts and conclusions of law which are really in issue, that it becomes necessary in this brief to state the facts as they actually exist; and to state the issues as such, and not as proven foundations for an argument for the granting of a writ of certiorari.*

On January 6, 1936, the Commission issued an order of inquiry and investigation directed to the respondents (R. 23-24). This order was issued at the instigation of the Governor and Public Service Commission of Pennsylvania for the purpose of obtaining certain information desired by the Pennsylvania Commission, which the latter had no right to obtain under the State Law, for use in the prosecution of local proceedings to impose penalties against respondents and others (R. 5, 6, 23, 41).

* As hereinafter noted, the Commission has, for instance, *assumed* in its petition for certiorari the underlying point still at issue before it: that it has jurisdiction to carry on its investigation.

The purported purpose of the Federal Commission's investigation is to inquire into the propriety of certain contracts and working arrangements between respondents and third persons under which services were rendered, to inquire into the propriety of the charges made thereunder, and to ascertain the cost to such third persons of rendering the services for which charges were made (R. 23-26).

The jurisdiction and power of the Commission to conduct such an investigation was challenged at the outset. After an accounting report was made by the Commission's field examiners, the majority of whom were in the pay of the Pennsylvania Commission (R. 45, 51), and in furtherance of their recommendations, the Commission made the order of January 26, 1937 (R. 25-27), of which the respondents have been diligently attempting to obtain an administrative and court review—a review which the Commission, with equal diligence, has attempted to avoid and prevent, and is still doing so.

The order of January 26, 1937, was a definitive order directed to the respondents which, under the very terms of the Federal Power Act (§§315, 316), the respondents were constrained to obey under pains and penalties, civil and criminal. This order directed the respondents and some thirty-five other persons, firms and corporations to appear at a hearing on March 3, 1937, and "to present for the record * * * full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them," and any of the more than thirty other persons named in the order "controlled, directly or indirectly, by such person or persons." The respondents were further ordered to prepare and present certain specific information and data and to

assist the Commission in determining the facts as to the control of each of the persons named in the order, all as more fully appears in the order itself.

It appears of record (R. 19, 20) that the Commission has at no time objected to the rates, services or facilities offered by respondents in the conduct of their business, nor has the Commission or anyone else ever charged any of the respondents with any violation of the Federal Power Act or the rules or regulations promulgated thereunder.

The respondents believed, and still believe, that the Commission was utterly without power or authority to issue the order of January 26, 1937, and to protect and preserve their rights, undertook to obtain a review of the Commission's action. Such a review, and the procedure thereon, is provided for under Section 313 of the Federal Power Act (petition for certiorari, pp. 26-28). The filing of a Petition for Rehearing with the Commission is there made the appropriate administrative remedy, and the essential prerequisite to ultimate court review; for only those matters raised by a Petition for Rehearing may thereafter be considered by the Court.

The respondents promptly attempted to avail themselves of the administrative remedy thus afforded. That they have not yet exhausted that administrative remedy after fourteen months have elapsed, is not due to any delay on their part, nor to any attempt by the Court below to usurp the administrative function. **The "dilatory practice hardly to be justified on the basis of expedition"** (petition, p. 19) **is solely that of the Commission, which, had it not to this day studiously avoided making a decision, could long since have had the controversy set at rest.**

A proper Petition for Rehearing (R. 13-29) was duly filed by respondents. That Petition sets forth in clear and concise form the objections of the respondents to the Commission's order of January 26, 1937. **It cannot be stated too emphatically that these objections are jurisdictional objections of the most fundamental character.** They show that the Commission does not even have jurisdiction of the persons of three of the respondents; that the Commission has no statutory authority to carry on this investigation; that such authority could not constitutionally be conferred on the Commission. The objections show that the Commission has no authority to conduct proceedings for the *real* (and now admitted*) purpose of supplying information to the Pennsylvania Commission to aid it in its local action for penalties; nor for the *professed* purposes appearing by the Commission's orders. They are directed to the Commission's right to conduct *this* investigation, not to a question of its collateral jurisdiction to investigate in many other cases legally provided for. **These fundamental jurisdictional questions have never been determined by the Commission.**** **They**

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* Respondents asserted that the *real* purpose of the investigation was to supply information to a state commission, which it had no right to obtain under state law, to supplement its powers in a local proceeding to impose penalties under local law. This is now conceded, although prior to the filing of the Commission's sworn return, its first sworn document in the court below (R. 40-48), the Commission's counsel had disavowed any concern with the Pennsylvania matters.

** That the Commission has such jurisdiction is *assumed* in the petition for certiorari, just as it was assumed and exercised in the proceedings which gave rise to the application to the court below. See petition, p. 4. These assumptions appear even in the statement of Statutes Involved. (Compare references to Fed. Power Act, §§301(c), 307 and 311, at pp. 3, 4, 23-26 of the petition.) All this despite the fact that the Commission has never made a determination of its jurisdiction, and has only flouted respondents' objections, instead of deciding them.

were not before the Circuit Court of Appeals for determination, and were not determined by that Court. They are not now before this Court.

Upon the filing of the Petition for Rehearing, the Commission, first, **adjourned without day** the hearing fixed by the questioned order of January 26, 1937 (R. 3); second, **granted the Petition for Rehearing** (R. 49); and third, fixed April 14, 1937 as the date for the rehearing. But, despite the fact that the hearing under the investigation order had been adjourned without day and was never renoticed, the respondents soon discovered that the investigation was indeed continuing, but under the guise of the rehearing granted to determine legal issues raised by the aforesaid objections.

The respondents attempted to clarify the situation at the outset. Objections to evidence in furtherance of the investigation were followed by a request to the Trial Examiner to certify to the full Commission the question of whether or not the challenged power to investigate might be assumed to exist, and exercised in the teeth of the challenge—**in the very rehearing granted to consider the objections**. This action was to no purpose.

The petition for certiorari disingenuously suggests (p. 19) that all that was involved was a matter of objections to admissibility of evidence on which a trial examiner may have ruled erroneously, without review by the Commission. Far from it. A formal petition was filed with the full Commission objecting to the course of the proceedings (R. 29-35). The burden of the objections was, *not* that errors had been made in the admission of evidence on the rehearing, **but that the rehearing was a sham, a masquerade for the very investigation, hearings on which had been adjourned without day.** A recess was

taken so that the Commission could consider this formal petition. The Commission, after consideration, refused to take any action, and the sham rehearing—the investigation—continued daily. Thus respondents' efforts to exhaust administrative remedies succeeded only in having the Commission make clear the fact that it intended to proceed with its investigation, rather than to determine the objections that it was without power to do so.

It was, therefore, made obvious to the respondents that if the Commission investigated, and **after completing** the investigation under the guise of granting a rehearing, considered whether it had the power to carry on the investigation **already completed**, the entire matter would have been made **moot**. A review by the Commission itself, and, if necessary, by the Circuit Court of Appeals, of whether the Commission had the power to conduct an investigation which it had already conducted would have presented only an academic question. When it is remembered that the investigation was admittedly undertaken for the purpose of supplying information to the Pennsylvania Commission for use in the prosecution of local proceedings for the imposition of penalties, it is clear that a determination of the legal right to investigate after the investigation had been completed and the information supplied, became a matter of small moment.

On this state of the record before the Commission, respondents applied to the Court below. It is idle to assert, as is done in more than one place in the petition for certiorari, that the Court was called on to correct errors in admitting evidence, or "to sit with the Commission" to pass on proffered testimony and its relevance. The statement in the petition that one of the questions presented is the propriety of enjoining the proffer of evidence "in the course of an investigation" (p. 3), is

scarcely excusable. A casual examination of the record taken before the Commission in its so-called "rehearing" makes immediately apparent that it was the investigation indeed which was being pursued. **But the reality which the Court below fully grasped** (opinion, R. 50-54), **was the fact that the hearing was not supposed to be one in the course of the investigation; for such hearings had been adjourned by the Commission itself without day.**

REASONS FOR DENYING THE WRIT

(1) Petitioner has failed to present to this Court a proper and complete record of the evidence upon which the Circuit Court of Appeals made its decision.

The subject of respondents' application in the Court below was the *conduct* of the Commission in carrying on an adjourned investigation under the guise of a rehearing granted to consider objections to its jurisdiction to investigate. Exactly what the course of conduct was could only be described and characterized in respondents' petition to the Circuit Court, the same as it can only be described and characterized in this brief. *But the transcript of the record before the Commission showed*, far better than any mere description, *what the Commission's conduct was.* It was indisputable proof of it. And as such proof it was offered in evidence at the hearing before the Circuit Court of Appeals.

The Commission's strenuous objections to its admission were overruled. The Circuit Court's judgment recites consideration of the Commission's record as the basis of its decision (R. 62). The Clerk of that Court certified that record as part of the proceedings in his Court.

But the Commission, in preparing the transcript to be filed in this Court, caused to be printed everything **except**

respondents' proof below, the record before the Commission.

Not only was the record not printed, but the Solicitor General, representing the Commission, *refused* even to agree that it is part of the record to be considered by this Court on the certiorari application, and *refused* to print it even if certiorari were granted.* Furthermore, it was represented to this Court as a basis for a motion by the Commission to shorten the extended time to file this brief, that "the testimony before the Commission was not a part of the record in the Circuit Court of Appeals and therefore is not a part of the record in this Court or required to be printed as such."**

That that representation is incorrect† is established beyond question by the certificate of the Circuit Court of Appeals for the Third Circuit, that the record before the Commission was offered in evidence, admitted in evidence, considered in the disposition of the case, and included in the record certified to this Court.‡

The printed "Transcript of Record" filed with the petition herein is incomplete. The diminution of the record was called to the attention of the Commission and to the Solicitor General. Effort was made to have it corrected. Correction was refused by the Solicitor General on behalf of the Commission.*

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* See telegram from Solicitor General to respondents' counsel, printed at page 13 of respondents' reply to the Commission's motion to shorten the time to file this brief, filed April 25, 1938.

** Commission's motion to shorten time to file this brief, page 4.

† This statement ignored the affidavits to the contrary of three of respondents' counsel who were present at the hearing in the Circuit Court of Appeals at which the record was admitted in evidence.

‡ A certified copy of the certificate is on file in this Court, a copy thereof appears at pages 9 and 10 of respondents' reply to the Commission's motion to shorten the time to file this brief, and is printed as an Appendix hereto.

This Court, it is respectfully submitted, should refuse to entertain such a wilfully defective application for a writ of certiorari.

(2) Neither the legal rights, nor the administrative processes, of the Commission, are injured by the decision of the Circuit Court of Appeals.

The Circuit Court of Appeals correctly apprehended the character of the proceedings before the Commission, and respondents' petition below with respect thereto. Plainly, that Court did not consider the merits of the objections raised by the Petition for Rehearing. Plainly, it did not consider the petition to it as calling for a mere ruling on proffers of evidence. It considered, and rightly so, that there was called to its attention an arbitrary and deliberate course of conduct, which was not only highly injurious to the respondents in their pursuit of the administrative remedy provided by Act of Congress, but which at the same time nullified the Circuit Court's appellate jurisdiction, likewise provided by Act of Congress, to review seasonably raised objections to the fundamental jurisdiction of the Commission.*

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* The Commission has been conveniently inconsistent in characterizing its "rehearing". The transcript of the record before it shows many instances where the "rehearing" to consider respondents' objections was admitted to be a hearing in furtherance of the adjourned investigation, which in fact it was. This seems to be its present position (petition, p. 3; Commission's motion, filed April 22, to shorten extended time to file this brief, p. 2). Yet occasionally it is equivocally stated that the "rehearing" was not a hearing on the investigation, but one to determine jurisdiction (petition for certiorari, p. 7; R. 48). The record before the Commission, which was in evidence below, but which the Commission refused to have printed, shows that this was not so. See opinion below, R. 52; stenographic transcript of testimony before the Commission, *e. g.*, at pp. 305, 308-9, 326-8, 387-8, 419-20, 439, 441, 464-6, 473-4, 497-8, 505-7.

The Court found that it was the duty of the Commission, having granted the Petition for Rehearing, to determine the objections raised thereby. The mandate of the Court did no more than state a simple guide for carrying out that administrative duty which no reasonable administrative body could or should object to following.

The decree did not jeopardize the progress of the Commission's investigation, as the petition for certiorari asserts (p. 20). **Under that decree the Commission may proceed *instanter* to a determination of the question of jurisdiction; and if it determines that it has jurisdiction, it may then proceed *instanter* with the investigation itself. The Commission is in no wise injured by the decision; it is unnecessary that this Court consider the validity thereof.**

It is immediately apparent, therefore, that the decree of the Court below was in effect no more than an interlocutory ruling restraining the Commission from frustrating the respondents' administrative remedy and the Court's appellate jurisdiction, and preserving as live issues the objections made by respondents in their Petition for Rehearing, as and when it may become necessary for them to take an appeal from the order that will ultimately be made by the Commission. **The decree of the Court below in no sense terminated the controversy between the Commission and respondents, nor was it final in character.**

This Court has repeatedly held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree".* See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916); *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372 (1893); *The Conqueror*, 166 U. S. 110 (1897); and *City and County of Denver* v. *New York Trust Company*, 229

* Emphasis and parenthetical matter within quotations throughout, ours.

U. S. 123 (1913). This Court has repeatedly warned that **the circumstance that the decision of the Circuit Court of Appeals does not finally terminate the controversy is "a fact that of itself alone furnishes sufficient ground for the denial of the application".** *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.* (*supra*).

(3) The decision below is neither a departure from the usual course of judicial proceedings nor a departure from the principles governing orderly review of administrative action.

From what has already been stated, it is apparent that the decision below was designed to promote orderly procedure. If the simple procedure required by the Circuit Court's judgment had voluntarily been followed by the Commission, a review of respondents' jurisdictional objections could long since have been had before the Commission, and, if adversely decided by it, before the Circuit Court of Appeals.

The Commission cites in its petition a number of cases* to support its claim that the decision below violates established canons of judicial administration. None of them does so. Principally relied on is *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (1922). In that

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* *Myers* v. *Bethlehem Shipbuilding Corp.*, No. 181, Oct. Term 1937.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927).

Bradley Lumber Co. v. *National Labor Relations Board,* 84 Fed. (2d) 97, (1936).

Macfadden Publications v. *Federal Trade Commission,* 37 Fed. (2d) 822 (1930).

Chamber of Commerce v. *Federal Trade Commission,* 280 Fed. 45 (1922).

case the plaintiff attempted to obtain by certiorari from a Circuit Court of Appeals a *reversal* of action taken by the Federal Trade Commission overruling objections to an order made by it. The statute under which the order in question was made contained no provisions similar to those of the Federal Power Act for the review of Commission orders. The Circuit Court had no jurisdiction to review, and certiorari proceedings did not, therefore, come within the powers which under Section 262 of the Judicial Code may be exercised to protect an existing appellate jurisdiction. The plaintiff's action was nothing more than an attempt to invent what was correctly recognized as an unauthorized substitute for a non-existent appeal.

The respondents sought no such unauthorized remedy as did the plaintiff Chamber of Commerce. The majority of the Court below recognized that no appeal was before it, despite the efforts of the Commission, now as before, to force argument on the objections still resting undecided before it. The Court below properly stated the situation when it said:

> **"These proceedings were taken so that the questions would not be moot if and when they come here"** (R. 53).

Here is the distinction between the case at bar and the many cases, some of which are cited in the Commission's petition, which correctly hold that administrative remedies must be exhausted before judicial review may be had. There is no conflict. In all of these cases an attempt was made to substitute judicial process for administrative process, to the destruction of the latter. The decision below, on the contrary, far from destroying the administrative process, *preserves* it, and expressly refuses to assume a

jurisdiction to decide matters committed to the administrative body for determination. Said the Court:

> "Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition [for Rehearing]. We are going to remand the case for such determination.
> * * *
> In remanding the case, we express no opinion on the merits on the questions to be decided." (R. 53)

Just as this Court has refused to countenance judicial action destructive of administrative jurisdiction (*Myers* v. *Bethlehem Shipbuilding Corporation,* Oct. Term 1937, No. 181, decided January 31, 1938), so also did the Court below refuse to countenance a perversion of administrative action which was destructive of the judicial jurisdiction. In this there is no more novelty than in the abuse which required the action to be taken. In principle there is nothing novel or unprecedented whatever.

There is surely nothing unprecedented in the protection by the Circuit Court of Appeals of its appellate jurisdiction. Judicial Code, §262. *McClellan* v. *Carland,* 217 U. S. 268 (1910); *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945 (1904); *Frankel* v. *Woodrough,* 7 Fed. (2d) 796 (1925). Its decision and order have done no more than this. It cannot be that such a decision, which prevents what otherwise would be an uncontrolled abuse and assumption of powers by an administrative body, can unsettle the law.

(4) The decision below is not in conflict with decisions of this Court nor with the decisions of the Courts of other Circuits.

The decision is entirely consonant with this Court's recent reiteration of the fundamental rights guaranteed by the Constitution, but so readily subject to invasion by administrative bodies. In *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1 (1936), this Court stated that arbitrary power and the rule of the Constitution cannot co-exist. And:

> "To escape assumptions of such power on the part of the three primary departments of the government, is not enough. **Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well.**" (p. 24)

Nevertheless, as a strenuously urged reason for the granting of its petition, the Commission urges the "general importance" of the decision below because it conflicts with the Commission's contention that there may be no intervention in the progress of administrative proceedings. The Circuit Courts of Appeals may protect their appellate jurisdiction from destruction by inferior judicial bodies, surely; but not, proclaim the Commission's arguments, from destruction by an administrative body. This sacrosanct claim to an irrebuttable presumption of *omne rite acta* is consonant with the same stubborn insistence that has characterized the Commission's proceedings throughout—the insistence that, despite the challenge of the respondents' objections to its jurisdiction, the Commission may arbitrarily assume such jurisdiction, and, having assumed it, may and should proceed with its exercise unfettered by the possibility of judicial scrutiny. It is difficult to conceive how such an argument can appeal

to the discretion of this Court, which said in *Jones* v. *Securities and Exchange Commission* (*supra*), concerning an unauthorized investigation:

> "And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments —even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties." (p. 24)

and further (p. 27):

> "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light."

The Commission argues that because the Court below determined that it had appellate jurisdiction with respect to the Commission's order of January 26, 1937, its decision fails to follow the applicable decisions of this Court, and is in conflict with decisions of the Courts of Appeals of other Circuits. But the Commission fails to show wherein such conflict lies. There is none.

In the first place, there is no question but that Section 313 of the Federal Power Act does in terms provide for a review of the order in question, as well as any other order of the Commission. No exception is made to orders which the Commission characterizes as "interim" or "procedural". To make such an exception would require judicial legislation to supply what the Congress did not say. Such action has been uniformly condemned. *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269 (1929).

Nor can it be said that there will be no transcript of record on which to base a review. In suggesting that argument (petition, p. 12) the Commission is seemingly forgetful of its later correct statement (petition, p. 19) that before a review may be had, administrative remedies must be exhausted. In that process, in every case will be developed an ample record. Surely, there is one here, as this Court could more readily see, had it been printed as the rules of this Court require.*

In the second place, there is no conflict in principle between the decision below and decisions of this Court or Courts of other Circuits.

The case principally relied upon by the petitioner is *United States* v. *Illinois Central R. Co.*, 244 U. S. 82 (1917). Even a tortured construction of the facts fails to make the *Illinois Central* case an authority for the petitioner. In an effort to do so, however, the Commission attempts to establish that its order of January 26, 1937,

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* Compare, *American Sumatra Tobacco Co.* v. *Securities & Exchange Commission*, 93 F. (2d) 236 (App. D. C., September 1937) where the Court rejected a Commission argument that, because there might be no record, an "interim" order was not reviewable under the provisions of the Securities Exchange Act (§25(a)) similar to those of Section 313 of the Federal Power Act.

was not an order at all. In the *Illinois Central* case the Court had under consideration a certain notice of hearing issued by the Interstate Commerce Commission, which the Court refused to review on the ground that it "had no characteristics of an order, affirmative or negative". As the Court said, it was not "one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree". Merely reading the I.C.C. notice sought to be reviewed immediately reveals that it bears none of the characteristics of the Federal Power Commission order here in question. So that this may be completely clear, the I.C.C. "order" is quoted *in full:*

> "The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock a.m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.
>
> By the Commission."

Contrast this three-line notice, which commanded no one to attend the hearing, and, as was pointed out by the Court, constrained no one to obedience, with the lengthy order here under consideration (R. 25-27). The Commission's order is entitled as such, is referred to in itself and in the minutes of the Commission as an *order,* requires the attendance of parties, constrains them to obedience under pains and penalties, both civil and criminal (Federal Power Act, §§315, 316), and orders and directs them not only to appear, but to furnish information and data, to take definite action, and to be investigated. It has recitals, following which is a mandate, prefaced by the words "Now, Therefore, *it is ordered*". As was stated by the Court below (R. 53):

> **"The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, * * *."**

Under the *Illinois Central* case, the Commission's leading authority, therefore, the Commission's order of January 26, 1937, was exactly what the Commission designated it and intended it to be, namely, an order. It is still that and nothing more, despite the Commission's attempted investiture of it with chameleon-like qualities, which enable it to start life as an order, so denominated, graduate into something "in the nature of a subpoena duces tecum", then make the complete change into "such a subpoena", subject to construction, rules and authorities as such, and quickly, within the short space of two lines of the petition for certiorari (p. 14) resume its character as an order because its usefulness as a subpoena has ended.

In a more or less orderly retreat from the untenable position that the order of January 26, 1937, is a subpoena duces tecum and, therefore, not reviewable, it is contended that the order is not reviewable because, although an order, it is "preliminary". *Jones* v. *Securities and Exchange Commission,* 79 Fed. (2d) 617 (1935), on which the Commission relies, is no authority. That was a decision on the consolidation of two proceedings, the first brought by Jones to review an order of the Securities and Exchange Commission refusing his application to withdraw a registration statement, and the second brought by the Commission to enforce his attendance as a witness. The Second Circuit Court of Appeals denied the review requested by Jones on the ground that the order was not appealable, and granted the Commission's application. Certiorari was denied by this Court in Jones' case, but at the same time was granted in the proceedings instituted by the Commission, which presented the entire controversy. This Court, at 298 U. S. 1, reversed the Circuit Court of Appeals, and held the

order refusing to permit withdrawal of the registration statement to be arbitrary, illegal and unconstitutional, and directed that the subpoena be quashed. To argue that the Securities and Exchange Commission's order was not reviewable is idle, when the effect of this Court's decision was **both a review and a reversal.**

(5) The petition fails to show any "special and important reasons" which the rules of this Court* require for the granting of the writ.

As has herein been shown, there is no conflict between the decision below and decisions of the Courts of Appeals of other Circuits. The decision is **not** one of an important question of federal law which has not been, but should be, settled by this Court. Nor has the Court below decided a federal question in any way in conflict with applicable decisions of this Court. There is no departure from the accepted and usual course of judicial proceedings, much less such a departure as to call for the exercise of this Court's power of supervision.

The basic contentions of the Commission throughout this proceeding, and the contentions upon which its application is based, are fallacies of law and fact. They have been recognized as such by the Court of Appeals. They merit no more favorable consideration in this Court.

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* Rule XXXVIII.

(6) The Commission has denied to respondents the minimal requirements of fair play which must be afforded by all administrative bodies; and the Commission is estopped by its own representations and conduct from making any claim of injury by the decision below.

This Court very recently had occasion to point out, in *Morgan* v. *United States,* October Term, 1937, No. 581 (decided April 25, 1938):

> "**The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.** On the contrary, it is in their manifest interest.
>
> "For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, **they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.**"

Throughout these proceedings the Commission has proceeded with what may be characterized as a studious disregard of even the simplest principles of fair play. In this regard it is important to remember that **the Commission granted the Petition for Rehearing** by which respondents' objections were raised; **granted a rehearing** on a day certain; and **adjourned** the main proceeding, **the investigation, without day.**

It then proceeded, overriding all of the respondents' objections and in utter disregard of judicial tradition, **to enter upon the very investigation which it had adjourned, and to make a mockery of the rehearing which it had granted.**

Naturally, with such a record, the Commission fought vigorously to prevent the transcript of its proceedings from being admitted in evidence in the Circuit Court of Appeals, and when overruled on this, it seems equally averse to having this Court consider the record, which shows what the Commission's conduct has been and what it has done and has been attempting to do to the respondents. So averse was the Commission that not only did it fail to comply with this Court's rules and print the full record of the proceedings below, but, moreover, it represented to this Court that the transcript of its proceedings was no part of the record below and therefore not a proper part of the record in this Court. When respondents properly obtained an extension of time to see if some arrangement could be made so that this Court would have the entire record before it, the Commission wrongfully charged the respondents with seeking to delay the determination by this Court of the matter; although all of the Commission's efforts to date have been centered on making moot any judicial determination of its fundamental right to make the investigation. The Certificate of the Circuit Court of Appeals filed with this Court (printed as an Appendix hereto) shows that there can be no possible mistake about the record.

The decision of the Court below requires no more than a conformity with the representations of the Commission which were implicit in its action. The Court has directed the Commission to do exactly what the Commission itself *represented* that it proposed to do—that is, to allow respondents their administrative remedy and to consider and decide respondents' jurisdictional objections; in the meantime, to stay the investigation.

Under the circumstances, it is respectfully submitted that no possible injury can be done in denying the petition

for certiorari made on a wilfully defective record, and leaving the Commission where it placed itself, viz., subject to a decree which requires no more than that the Commission follow the proper procedure which the Federal Power Act contemplates, and which the Commission itself originally proposed and represented that it would follow.

The petition for certiorari should be denied.

Respectfully submitted,

WALTER BIDDLE SAUL,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
SAUL, EWING, REMICK & SAUL,
of Counsel.

April 28, 1938.

Appendix

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, and SOLAR ELECTRIC COMPANY

Certificate

AND NOW, to wit, April 23, 1938, upon motion of Walter Biddle Saul, counsel for the respondents, the Circuit Court of Appeals of the United States for the Third Circuit, hereby certifies that the record of the hearings before the Federal Power Commission were offered in evidence before this court and admitted in evidence and the said record was considered by this court in the order which it made in disposing of the petition of the Metropolitan Edison Company, et al, and the said record of the proceedings before the Federal Power Commission were certified to the United States Supreme Court by the Clerk of this court as part of the record which was before this court.

PER CURIAM
(Sgd.) BUFFINGTON
Senior Circuit Judge

Received & Filed, April 23, 1938
WM. P. ROWLAND,
Clerk

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF

WALTER BIDDLE SAUL,
Packard Building,
Philadelphia, Pa.,
Counsel for Respondents.

C. EDWARD PAXSON,
EDWARD F. HUBER,
GEO. J. BANIGAN,
61 Broadway,
New York, N. Y.,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF

Opinion Below

The opinions below are reported at 94 Fed. (2d) 943 (advance sheets of April 4, 1938).

Jurisdiction

The case is here on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Jurisdiction is invoked by petitioner under Section 240(a) of the Judicial Code, as amended (USC, Title 28, §347).

Statutes Involved

The statute principally involved is Section 313 of the Federal Power Act, hereinafter sometimes referred to as the "Act", (USC, Title 16, §825 l). Incidentally involved are Section 262 of the Judicial Code (USC, Title 28, §377) and Sections 315 and 316 of the Federal Power Act (USC, Title 16, §825 n and o).

Statement of the Case and the Questions Involved

The Circuit Court of Appeals for the Third Circuit, after hearing and argument and consideration of evidence, issued an order directed to the Federal Power Commission (hereinafter referred to as the "Commission") remanding for determination certain jurisdictional objections raised by respondents in a Petition for Rehearing filed with the Commission, and restraining the Commission from proceeding with a proposed inquiry and investigation of the respondents until such jurisdictional questions are determined by it.

The case arose in the Circuit Court of Appeals on the filing by respondents of a petition calling for the exercise by that Court of powers conferred upon it by Section 262 of the Judicial Code (28 U. S. C. §377), the so-called "all writs" section.* The decree of the Court was prayed for, not as on review of a determination of the Commission, but in the exercise of the Court's limited original jurisdiction, by which it may issue any appropriate writ or process to protect its appellate juris-

* Judicial Code §262: "Power to issue writs. * * * The Supreme Court, the circuit courts of appeals, and the district courts, shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

diction.* Respondents showed, first by their petition, and later by proof formally admitted in evidence, that certain proceedings before the Commission were so conducted as to nullify the appellate jurisdiction of the Circuit Court of Appeals.

The opinion of the court below, which, by its order of March 7, 1938 (R. 63), stands as its findings of fact and conclusions of law, embodies its decision sustaining the contentions of the respondents on the only two questions in this case:

> 1. Has the Circuit Court of Appeals general appellate jurisdiction to review the Commission's order of January 26, 1937?
>
> 2. If the Circuit Court of Appeals has such appellate jurisdiction, was the conduct of the Commission complained of in respondents' petition and shown by respondents' evidence such as to impair or destroy that appellate jurisdiction, so that the Court should issue its process under Section 262 of the Judicial Code to protect that jurisdiction?

The first is a question of law; the second a question of fact. They will be considered in inverse order only because a presentation of the facts is first necessary to the full comprehension of the question of law involved.

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* *McClellan* v. *Carland*, 217 U. S. 268; *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945; *Frankel* v. *Woodrough*, 7 Fed. (2d) 796.

POINT I

THE CONDUCT OF THE COMMISSION WAS DESTRUCTIVE OF THE APPELLATE JURISDICTION OF THE COURT BELOW.*

The admission in evidence before the Circuit Court of Appeals, over the strenuously urged objections of the Commission, of the record of its proceedings, should enable this Court to determine that question of fact on the basis of the record of what transpired before the Commission—free from any possible color of overstatement by respondents on the one hand, or understatement and excuses by the Commission on the other. However, in disregard of the rules of this Court, and to the obvious prejudice of respondents, the Commission has failed to cause that record to be printed—on the excuse that the Solicitor General claims that such record was not in evidence before the Circuit Court of Appeals—this despite the fact that it clearly was offered and admitted in evidence as is shown by the per curiam certificate of the Circuit Court of Appeals dated April 23, 1938, filed in this Court on April 25, 1938, reciting that such record was offered and admitted in evidence before the Circuit Court and considered by it in the order which is the subject of the Commission's appeal.

The full record consists of over 575 pages of the stenographic transcript, more than 1,000 pages of matter incorporated by reference, and a number of exhibits. This stenographic transcript and the exhibits, constituting such record, are on file with the Clerk of this Court, having

* The existence of such jurisdiction is shown under Point II, at pp. 10 to 28, *infra*.

been forwarded to him by the Clerk of the Circuit Court of Appeals in certifying the record of the case to this Court; and respondents respectfully express their hope that the inconvenience caused by the Commission's disregard of the rules in failing to print that record will not deter this Court from seeing for itself, through an inspection of that record, that the conduct of the Commission complained of was even more unfair than it can possibly be shown to have been through mere characterization in this short brief.

The proceedings before the Commission arose in this way:

In 1935, certain proceedings were undertaken by the Pennsylvania Public Service Commission directed to the respondents and four other Pennsylvania corporations, having for their objects the imposition of penalties under the state law for alleged violations thereof. To aid the prosecution of the Pennsylvania Commission's investigations, the Federal Power Commission was called upon to undertake an investigation by which information might be supplied to the Pennsylvania Commission which the latter had no right to obtain under the state law. Upon certain representations of the Governor and the Public Service Commission of Pennsylvania, the Federal Power Commission, by order dated January 6, 1936 (R. 23-4), instituted an inquiry and investigation of the six respondents now before this Court, purportedly to determine the propriety of contracts and working arrangements between respondents and third persons, the charges paid thereunder, and the cost of services to the persons rendering the same (R. 23-26). The respondents then, as now, claimed that the Commission lacked statutory and constitutional power to carry on such investigation. After field

examinations had been made by examiners for the Federal Power Commission, most of whom were in the pay of the Pennsylvania Commission (R. 45-51), a report was submitted by two of them. On the basis and as a result of recommendations contained in that report, the Commission, on January 26, 1937, issued an order (R. 25-7) to the respondents and thirty-five other persons, firms and corporations, requiring affirmative action to be taken by respondents in furtherance of the Commission's investigation.

Respondents, believing themselves aggrieved by this order, promptly attempted to obtain relief therefrom. The remedy which they invoked was that provided by the Federal Power Act,* the Act of Congress by which the Commission's jurisdiction and powers are exclusively conferred and limited. This remedy is first of all an administrative remedy, which has to be exhausted as a prerequisite to the invocation of the second remedy provided by the Act, a judicial review by the appropriate Circuit Court of Appeals.*

The administrative remedy expressly provided in the Act is for the aggrieved parties to file with the Commission a "Petition for Rehearing" in which the grounds of objection are required to be specifically stated. Only on denial by the Commission of the Petition for Rehearing, or if it is granted, upon affirmance by the Commission of all or part of the order against which the Petition for Rehearing is filed, *i. e.*, only upon the completion of the administrative remedy, may the aggrieved parties seek a court review—and then only a review as to the objections specifically stated in their Petition for Rehearing.

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* Federal Power Act, §313, printed in full text in the Appendix hereto.

The objections stated in respondents' Petition for Rehearing (R. 13-29) were as basic as it is possible for objections to be. Respondents therein asserted that the Commission lacks jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, the charges paid thereunder, and the cost of services to the persons rendering the same; otherwise stated, that the Commission is without jurisdiction of the subject matter of the investigation. Respondents further objected that the Commission was without power to investigate for its *real* purpose of supplying information to a State Commission for use in local proceedings for the imposition of penalties for alleged violations of local law. Finally, it was objected that, as to three of the respondents, the Commission was without jurisdiction of their persons, in the premises, because they are not "public utilities" as defined in the Federal Power Act.*

The day after the Petition for Rehearing was filed, **the Commission adjourned the investigatory hearing under its questioned order, without day.** Shortly thereafter, **the Commission granted the Petition for Rehearing** and assigned the matters involved therein for hearing before it on a day certain. The rehearing commenced by respondents' placing in evidence matters tending to establish the actual objections of the Petition for Rehearing, to wit: the facts showing the true purpose of the investigation, and the facts showing that the business and facilities of

* The Commission's jurisdiction under Part II of the Act (Part I concerning licensees of hydroelectric projects on navigable waters is not here involved) is limited to "public utilities" as defined in the Act, namely electric utility companies owning or operating facilities for the transmission or sale at wholesale of electric energy in interstate commerce.

three of the respondents were such that they were not "public utilities" as defined in the Act, and therefore not subject to the jurisdiction of the Commission in the premises. Respondents were furthermore prepared to present legal argument upon the fundamental legal proposition asserted in the Petition for Rehearing, that there is neither statutory nor constitutional power in the Commission to undertake and carry on the investigation of the subject matter of the investigatory order of January 26, 1937, to which the Petition for Rehearing was addressed.

At the conclusion of respondents' evidence before the Commission, and before argument on the questions of law was ever allowed the Commission's counsel ignored the objections made in the Petition for Rehearing, the hearing on the determination of which was then supposed to be in progress, and proceeded in furtherance of the very investigation under the questioned order, despite the adjournment of hearings thereon by the Commission itself without day.

The trial examiner was entreated to stop the perversion of the rehearing from its proper function, to consider the objections raised by the Petition for Rehearing, and to stop its conversion into a sham "rehearing" which was no more than a masquerade for the investigation itself (R. 7, 8). Such entreaties were unavailing. Likewise unavailing was a verified petition to the full Commission (R. 9, 25-29) to require the discontinuance of the mockery of the administrative remedy of rehearing, by which, under that name, the investigation was being carried forward to completion.

Respondents could do no more before the Commission. Their recourse to administrative protection was both complete and futile. Yet it was apparent to them, as it must

be apparent to this Court, that, had the Commission continued its investigation under the guise of the very rehearing granted to determine whether it had the power to investigate, the determination of that question would be made moot. A court review under such circumstances could likewise relate only to an academic and moot question. **Thus, not only was the administrative remedy of rehearing being frustrated, but the appellate jurisdiction of the appropriate Circuit Court of Appeals was being nullified and destroyed by the Commission's action.**

Because the respondents are Pennsylvania corporations with their busineses in that state, the appropriate Circuit Court of Appeals to review an order of the Commission directed to them is that of the Third Circuit.* In that Court the respondents filed a petition calling attention to the facts stated herein, and praying that the Court exercise its powers by the issuance of appropriate process to prevent the appellate jurisdiction granted to it by Act of Congress from being destroyed by the Commission's action (R. 1-35).

Respondents are content to rest on the record of the proceedings before the Commission and the findings of the court below as more than amply supporting the facts herein stated. These facts were more than enough to warrant the Court's findings** that the conduct of the

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* Section 313(b) of the Federal Power Act provides for a review—"* * * in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia * * *."

** See opinion below, R. 52; R. 63; stenographic transcript of testimony before the Commission, e. g. at pp. 305, 308-9, 326-8, 387-8, 419-20, 439, 441, 464-6, 483-4, 497-8, 505-7.

Commission, of which respondents complained, was destructive of the Court's appellate jurisdiction, and required the issuance of an order (R. 62) neither harsh nor novel under the circumstances—that the Commission proceed with the determination of the objections raised by the Petition for Rehearing.

The judgment of the Court below is in effect only interlocutory in character—remanding the matter as it does to the Commission for ultimate determination. It expressly does not decide the questions raised by the Petition for Rehearing and remaining properly before the Commission for decision. That judgment is the Court's determination of the facts after full consideration of the record of the proceedings before the Commission. As a judgment on those facts it constitutes the exercise of the Circuit Court of Appeals' sound discretion and should not be disturbed.

This decision, after all, requires no more of the Commission than that it proceed as it represented it would proceed, when it continued the investigation without day, granted the Petition for Rehearing, and assigned for hearing the matters involved thereunder.

POINT II

THE CIRCUIT COURT OF APPEALS HAS JURISDICTION TO REVIEW THE COMMISSION'S ORDER OF JANUARY 26, 1937.

We come now to a discussion of the fundamental legal question before the court below—did that court have any appellate jurisdiction to protect? Concededly, if the order of January 26, 1937, to which the Petition for Rehearing was addressed, was not ultimately subject to review by the court below, that Court had no appellate jurisdiction

to protect, and could not issue its process for that purpose.

We submit that the order was clearly reviewable.

Section 313(b) of the Federal Power Act provides:

> "(b) **Any party** to a proceeding under this Act **aggrieved by AN order** issued by the Commission in such proceeding **may obtain a review of such order in the Circuit Court of Appeals** of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."*

Despite the clear language of the statute, the Commission contends that the order is not reviewable. But if there is any limitation on the jurisdiction of the Circuit Courts of Appeals to review the order, such limitation, if it exists at all, must be found in the Federal Power Act itself through a clear limitation on that jurisdiction—a limitation which would permit such grievous injuries as have in this case been suffered by respondents, not only to be inflicted but to be continued in the very face of objection to them.

But the Federal Power Act contains no such limitations. The language vesting jurisdiction in the Circuit Courts of Appeals to review orders is all-inclusive. The subject of review is simply "**AN** order." That no limitation was intended is confirmed elsewhere in Section 313. Thus in paragraph (a) of that section it is provided:

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* Emphasis and parenthetical matter within quotations throughout, ours.

> "* * * No proceeding to review **ANY** order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."

A careful examination of the report of the Senate Committee on Interstate Commerce, of the minority report of the same Committee, of the report of the Committee on Interstate and Foreign Commerce of the House, and of the conference report of both Houses, concerning the proposed enactment of the Federal Power Act, reveals no statement or intimation of any kind that the language of Section 313 was in any wise intended to be limited, or is to be subjected to any construction other than the literal.

If the Commission's contention is to be sustained at all, it can be sustained only by having this Court read words of limitation into the statute which the Congress did not put there and did not intend to be there. It is almost unbelievable, but nevertheless true, that the Commission seeks to have this Court sit as judicial legislators to alter the language of the statute so that the Commission may continue a course of conduct which *per se* **requires** judicial review, and in effect to enact approval for the very action which nullifies and destroys the appellate jurisdiction of the Circuit Court of Appeals.

Although it is well recognized that statutes providing for appeals are to be broadly construed and not restricted, respondents do not ask for a liberal construction of Section 313 of the Federal Power Act, nor any construction of it at all. None is required. The provisions of the Federal Power Act are clear and unambiguous. As stated in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269 (1929), at page 277:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its

> construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. **It is elementary that where no ambiguity exists there is no room for construction. * * * Construction may not be substituted for legislation.***''

The citation of the myriad other authorities to the same effect is surely unnecessary in this Court.

To avoid the demolition of its legal contention which results from a consideration of the plain, unambiguous, and simple language of the statute, the Commission disingenuously resorts to several receding arguments, most of which are largely arguments of nomenclature rather than of substance. It is contended by the Commission:

> (1) that the Federal Power Act contemplates that the review of orders shall be restricted to those made after a hearing and upon a record;
>
> (2) that because the order was not what the Commission calls a "final" order, it is not reviewable. *Jones* v. *Securities and Exchange Commission,* 79 Fed. (2d) 617, and *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, are claimed to be controlling authorities; and
>
> (3) that the order of January 26, 1937, is not an order at all, but a "notice of hearing" or a "sub-

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* Citing *United States* v. *Wiltberger,* 5 Wheat. 76, 95-96; *United States* v. *Fisher,* 2 Cranch 358, 386; *Lake County* v. *Rollins,* 130 U. S. 662, 670; *Caminetti* v. *United States,* 242 U. S. 470; *Ex parte Public National Bank,* 278 U. S. 101; *United States* v. *Colorado & N. W. R. Co.,* 157 Fed. 321, 327.

poena duces tecum", and as such not within the purview of Section 313 of the Federal Power Act. Principally relied on to support this argument is *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82.

These arguments will be considered in the order stated. None of them is sound.

(1) The argument that the Federal Power Act contemplates that "reviewability" be restricted to those orders made after a hearing and upon a record is unsound in basic principle, as well as on authority. The logical pursuit of the underlying theory of this contention leads to an absurdity. It is fallacious because it proceeds on a misconception of the powers of the Commission and their limitations under the Federal Power Act, as well as upon a misapprehension of the rationale of a court review of action taken by an administrative body.

It is indisputable that the Commission is an administrative body of limited powers and jurisdiction. It has no inherent jurisdiction, such as might be claimed for a common law court of general jurisdiction. Its quasi-judicial functions, as well as its other powers, are derived solely from the Act of Congress under which it exists; and which at once prescribes its powers and limits them to those expressly granted. The jurisdiction of the Commission, in the **primary** sense of that word, is limited by the Federal Power Act, both as to the subject matter of action which may be taken by the Commission, and as to the persons with respect to whom such action may be taken. If the power to take a particular action, that is, jurisdiction over a particular subject matter, is not granted by the Act itself, then it cannot exist.

Every affirmative act of a true judicial body, such as a Court of general jurisdiction, implies that the court has ascertained that it has jurisdiction to act; that the status, factual or legal, which must obtain before the court may exercise jurisdiction, has been found by it to exist. *Cf. Cooper* v. *Newell,* 173 U. S. 555; *Manson* v. *Duncanson,* 166 U. S. 533.

It is because an ascertainment of jurisdiction is implicit in every affirmative act of a court, that there is a correlative presumption that jurisdiction, when exercised by a court of **general** jurisdiction, was properly exercised. But in the case of courts of **limited** jurisdiction, there is **no** presumption of jurisdiction arising out of its purported exercise (*McClaughry* v. *Deming,* 186 U. S. 49); although there is the same implicit finding thereof in every affirmative action by such a court. The rule applicable to a merely quasi-judicial body of unquestionably limited jurisdiction, such as is the Federal Power Commission, can be **no more** favorable than that which applies to courts of limited jurisdiction.

Thus the foregoing elementary principles establish that **implicit in every affirmative action of the Commission is the finding, the ascertainment, that it has jurisdiction so to act;** that is, that it has jurisdiction of the subject matter of its action, and of the persons against whom that action is taken.

Affirmative action is taken by the Commission when it makes an order affecting the rights of other persons, particularly where the order constrains such persons to obedience under pains and penalties. The most fundamental of all objections to such an order is that the Commission lacked power to make it because it had no jurisdiction of the subject matter. Such an objection is the most funda-

mental because, if sustained, it destroys the order as such, regardless of how well-founded or wise or expedient it might otherwise be. Compared to an objection of lack of jurisdiction of the subject matter, all other objections to an order of the Commission become secondary.

The Commission's order of January 26, 1937 is an order such as is above described. The petitioners' objections to that order are likewise of the fundamental character above described.

The Commission's argument that a hearing antecedent to an order is the indispensable *sine qua non* of reviewability contends for an absurdity, for it permits of the review of objections of secondary importance and at the same time precludes an effective review of an objection of the most fundamental importance. Such an absurdity cannot be imputed to the Congress as its intent in enacting Section 313 of the Federal Power Act, particularly where such an intent is nowhere discernible from the language of that provision.

All objections to an order based upon the Commission's findings of fact or of law made upon a record are, as above shown, of secondary importance to an objection of lack of jurisdiction of the subject matter. The Commission concedes that where, after a hearing on notice, an order is made embodying the Commission's decision, a party aggrieved may review the order on the mere objection that the Commission acted, not without power, but improvidently because of a misconception of facts or law. Yet on the Commission's basic theory, the absurd result is reached that no court review can be had where, as here, it is the Commission's **action**, rather than its possible decision thereafter, which is the cause for complaint; and no court review can be had where, as here, it is claimed that

the Commission lacks jurisdiction to act at all, providently or improvidently.

Not only is a lack of jurisdiction the most fundamental of all objections, but in this case it is a more serious objection than those which usually arise upon a decision after hearing. **This is true because, for a Commission to act without jurisdiction is not merely improvidence, but an unconstitutional denial of due process of law.** *Twining* v. *New Jersey,* 211 U. S. 78; *Pennoyer* v. *Neff,* 95 U. S. 714; *Scott* v. *McNeal,* 154 U. S. 34; *Wilmington City Ry. Co.* v. *Taylor,* 198 Fed. 159.

Can the Commission still contend that objections to an order on the ground that it constitutes, not only an unlawful exercise of power, but also an exercise of power which is arbitrary and unconstitutional for its denial of due process of law, are not reviewable merely because there was no antecedent hearing, when it admits that any minor objection to an order is reviewable if made after hearing? It is absurd to suppose that a hearing can have the magic effect of justifying such a contention.

Particularly is this true when it is the Commission's *sine qua non,* antecedent hearings, which would nullify any effective court review of the fundamental objections raised by the respondents. We need only to repeat that it is the Commission's action in investigating, rather than any order made at the conclusion thereof, that is the subject of respondents' objections. To hold the hearings in the face of the objections that there is no legal power to do so is to inflict an irreparable injury which cannot be redressed on any court review: for **it is obvious that a subsequent court determination that the investigation should not have been made cannot unmake it. Thus it appears that the Commission's *sine qua non* is the**

very thing which makes ineffective a review of the fundamental objections, and preserves only the review of incidental matters.

Among its many other fallacies, the Commission's theory that a prior hearing is indispensable to a court review misapprehends the function of such review. Court scrutiny of action taken by an administrative body is provided for so that rights may not be infringed and injury inflicted without redress. In arguing, as the Commission does, that only orders made after a hearing are reviewable, the Commission presupposes that only such orders can be injurious. This plainly is not the fact.

It must be evident that where the proceeding, as in this case, is investigatory in character, **the investigation itself may be equally as injurious as any order made at its conclusion, especially where, as here, the Commission may make available to State Commissions any facts found, and the Pennsylvania Commission has instigated this investigation to obtain facts for the prosecution of its own proceedings for the imposition of penalties because the state law does not allow it to do what it asks the Federal Commission to do for it.*** Reasonably, therefore, a court review should be allowed where it is sought to **prevent** the injury, particularly where the injury can never be redressed once it has been inflicted. There is nothing, therefore, in the rationale of reviewability of orders of administrative bodies which would make an antecedent hearing a prerequisite of review. Because the contrary is the fact, the court review provisions of the Federal Power Act, contained in Section 313 thereof, should not be construed as

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* cf. *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434; *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1.

requiring a prerequisite **which would destroy the very purpose and intent of the statute, and** which construction would **necessarily permit all investigatory orders to be proceeded with, no matter how constitutional rights may be trampled on in doing so.**

We have shown that the basic contentions of the Commission are fallacious and lead but to contradictions and absurdities. A construction of Section 313 of the Federal Power Act which will permit of such contradictions and absurdities obviously should not be indulged in if any other reasonable construction is available. But as heretofore shown (pp. 10-13), the statute on its face, without necessity for any construction, is ample to afford respondents a review of their objections to the Commission's order in question.

The Commission's contention that an antecedent hearing and record are prerequisites to reviewability are the same as those made by the Securities and Exchange Commission and rejected by the Court of Appeals for the District of Columbia in *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission,* 93 Fed. (2d) 236 (App. D. C. 1937). That case decided squarely that orders of the Securities and Exchange Commission denying confidential treatment to information filed are appealable under Section 25(a) of the Securities Exchange Act of 1934. The provisions of this section* are substantially identical with those of Section 313 of the Federal Power Act. The

* "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court within sixty days after the entry of such order a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Securities Commission expressly took the position, as does the Federal Power Commission here, that a reviewable order "is one entered only after notice and opportunity for hearing and upon a finding of facts." But, answered the Court:

> "Bearing in mind that the present hearing has no relation to the merits—as to which a wholly different situation may result—but is confined solely to the question of our jurisdiction, **we think the position of the Commission is not well taken.**" (p. 238)

It was likewise argued in that case that the order in question was not reviewable because there might be "no transcript to certify and no evidence to balance against findings of fact". This contention was likewise disposed of (p. 241):

> "But this practical difficulty results only from the Commission's interpretation of the pertinent sections, and that interpretation we do not adopt.* Under our construction of the Act there will be a record, and sufficient evidence upon which to test the conclusion reached."

So in the case at bar, although a hearing did not precede the Commission's order of January 26, 1937, there is nevertheless a sufficient record upon which to test the question of whether the Commission lacked jurisdiction to make it. As already pointed out (*supra*, p. 15), the very fact that the Commission **made** the order imports

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* That the court did not hold that a hearing was a prerequisite to a reviewable order is apparent from its discussion of *Miller* v. *United States*, 277 Fed. 95, and of *Baltimore & Ohio* v. *Lambert Run Coal Co.*, 258 U. S. 377, where implicit in the decision of Mr. Justice Brandeis was the conclusion that an order which required no antecedent hearing was reviewable.

the prior ascertainment of all prerequisite jurisdictional facts, and implicit in the order itself is a finding of jurisdiction. The subject matter of the investigation certainly appears of record from the only source where it could properly be stated—the orders of the Commission. The obligations imposed by the order are to be determined from the face of the order itself, and from the Federal Power Act, which surely requires no antecedent record for its construction. There is, therefore, a complete record in this case by which may be tested the objections raised by respondents. The objection as to lack of jurisdiction of the subject matter raises a pure question of law, and even if the Commission deemed it necessary to supplement the record by testimony to support the questioned jurisdiction of the persons of several of the respondents, the Federal Power Act makes ample provision for doing so.* Indeed, in this very case the Commission **at least** represented that it intended to allow the administrative remedy of a rehearing, at which, properly conducted, an ample record can be developed.

Because respondents had no opportunity to consider a brief by the Commission in this Court following the granting of a writ of certiorari, respondents are not aware of all of the contentions which it may make here. In the court below, however, the Commission contended that its order of January 26, 1937, was a mere administrative order in the course of a proceeding and therefore not reviewable. A similar argument was made in the *American Sumatra* case and disposed of by the Court as follows:

> "And we think what was said by Mr. Justice Holmes in Interstate Comm. Comm. *v.* Nor. Pac. Ry., 216 U. S. 538, is applicable to the point we are

* Cf. Section 313(b).

> discussing, that is to say, that we are dealing with an administrative order which it is charged and, for the purposes of this motion admitted, seriously affects property rights, **and if the Commission's present position is right we should be approving a practice which would permit this to be done by way rather of fiat than of adjudication. In such circumstances we think it would be going very far to say that the rights of the parties may not be inquired into by the courts.**" (p. 241)

In passing it may be noted that in the *American Sumatra* case the Court was in much the same position as was the court below,—it was not passing on the merits of objections raised but on the question of whether it had jurisdiction to pass on them in the future. In language most apt to describe the position of respondents, the Court there said:

> "Here the petitions for review allege irreparable injury through the threatened disclosure of the information contained in the applications which the petitioners characterize as trade secrets and the motion to dismiss concedes the truth of this application. In such case it is fundamental that the property rights of the citizen may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing, and judicial review, and we think it is not correct to say that either the language of the Act or anything which appears in the reports or hearings in Congress justifies the conclusion that Congress intended by the permissive language of Section 24(b) [under which the order was made] to deny the right of review." (p. 239)

(2) In the *Minneapolis Chamber of Commerce* case, *supra*, the plaintiff objected to an order of the Federal

Trade Commission and, upon its objections being overruled by that Commission, attempted to invent an unauthorized method of review by the use of a ceritorari proceeding in a Circuit Court of Appeals to **reverse** that Commission's determination. The Federal Trade Commission Act, under which the order was made, contains no provision for the Court review of the Federal Trade Commission's orders even remotely resembling the provisions of Section 313 of the Federal Power Act. The Court recognized the limitations on its powers inherent in the Federal Trade Commission Act, when it said:

> "The power of the court is limited to the enforcement of the final orders of the commission to cease and desist, upon the application of the commission, and to review of such orders at the request of the party against whom such orders are made • • •." (p. 47)

The Court likewise pointed out that the Federal Trade Commission Act:

> "• • • provides no penalties, nor has the commission power to make more than a finding of facts, which requires confirmation by this court before any burden is cast upon the parties subjected to inquiry." (p. 48)

Not only do these distinctions show that the result reached in the *Minneapolis* case is no guide to the proper result to be reached in this case, but the rationale of the *Minneapolis* case, where the Court noted that the Federal Trade Commission Act provides **no** penalties, emphasizes the necessity for the existence under the Federal Power Act, which **does** provide penalties, of a right of review of Commission orders. The granting to the Com-

mission by the Congress of such plenary powers necessarily must have been intended to have been accompanied by a wider jurisdiction in the Circuit Courts of Appeals to review the Commission's orders than was granted with respect to orders of the Federal Trade Commission in the Federal Trade Act, whereunder no such penalties exist and no such plenary powers are granted.

The difference in the provisions as to court review of Commission orders between the Federal Trade Act, passed in 1914, and the Federal Power Act, passed but recently, may well have been influenced by the concluding statement of the Court in the *Minneapolis* case:

> "It may be desirable that the law should provide for a preliminary review of questions of jurisdiction either by the Circuit Courts of Appeals or by the District Courts; but, in the absence of such provision, we can not assume that power."

As the Court in the *Minneapolis* case recognized that it could not by judicial construction enlarge its statutory powers in order to reach a desirable result, *a fortiori,* this Court should not, in the case at bar, by judicial construction, narrow a clearly granted statutory right of review.

Jones v. *Securities and Exchange Commission,* 79 Fed. (2d) 617 (C. C. A. 2), although relied upon by the Commission, supports respondents', rather than the Commission's, contentions. In the *Jones* case, it appeared that the Securities and Exchange Commission made an order rejecting an application by Jones to withdraw a registration statement previously filed. Jones thereupon applied to the Circuit Court of Appeals for the Second Circuit, for a review of that order. About the same time, the Securi-

ties and Exchange Commission issued a subpoena directing Jones to appear at a hearing in an investigation with respect to his registration statement. Jones refused to obey the subpoena. The Commission proceeded to enforce it in the District Court, and, upon a decision in the Commission's favor, Jones appealed to the Circuit Court of Appeals for the Second Circuit. The two appeals were consolidated, and in a single opinion the Circuit Court refused to review the Commission's order denying withdrawal of the registration statement, and affirmed the judgment of the District Court directing Jones to respond to the subpoena. Certiorari was applied for in both cases, and on the same day was denied in one case but granted in the other.* Thereupon, this Court** reversed the Circuit Court of Appeals and held that the Commission's order refusing to permit withdrawal of the registration statement was arbitrary, illegal and unconstitutional, and directed that the subpoena be quashed. It is clear from the decision that it was unnecessary for this Court to grant both certiorari applications in order to consider and determine the entire case on its merits. If the S.E.C. order was not reviewable, as the Commission argues here, how could this Court have reviewed it in fact, and decided that it was arbitrary, and unconstitutional? It is difficult to see how a more effective review of an order could be had than in a case where this Court's decision effectively condemned and reversed the S.E.C. order.

Indeed, the contentions of the Securities and Exchange Commission in the *Jones* case present striking analogies to those of the Commission in this case, which require similar disposition. The Commission has contended that

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* 297 U. S. 699; 299 U. S. 705.
** 298 U. S. 1.

its order of January 26, 1937 is valid because it is claimed to be within certain general investigatory powers provided in the Federal Power Act (*e. g.*, petition for certiorari, p. 4). That argument is substantially the same as the argument made by the Securities and Exchange Commission in the *Jones* case, that regardless of whether or not it had authority to investigate in connection with the withdrawal of the registration statement (which authority would necessarily fall when the order refusing to allow withdrawal fell), nevertheless, it had the right to make the same investigation under its general powers. This Court overruled that contention saying:

> "The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. * * *.
>
> "Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made, and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Disassociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the

> inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition * * * that the chance that something discreditable might turn up' (*Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434, 445)—an undertaking which uniformly has met with judicial condemnation." (pp. 25-6)

(3) In the *Illinois Central* case (*supra*) this Court had under consideration a certain notice of hearing, issued by the Interstate Commerce Commission, which the Court refused to review on the grounds that it "had no characteristic of an order, affirmative or negative". As the Court said, it was not "one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree" (p. 89). Merely reading the notice there before the Court immediately reveals that it had none of the characteristics of the Commission's order here in question. So that this may be completely clear, the I. C. C. "order" is quoted *in full:*

> "The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.
>
> By the Commission."

Contrast this three-line notice, which commanded no one to attend the hearing, and, as was pointed out by the Court, constrained no one to obedience, with the lengthy order here under consideration (R. 25-27). The Commission's order is entitled as such, is referred to in itself and in the minutes of the Commission as an **order,** requires the attendance of parties, constrains them to obedience under pains and penalties, both civil and criminal (Federal Power Act, §§315, 316), and orders and directs them not only to appear, but to furnish informa-

tion and data, to take definite action, and to be investigated. It has recitals, following which is a mandate, prefaced by the words "Now, Therefore, **it is ordered**". As was stated by the court below (R. 53):

> "The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, and constrained the petitioners to obedience at the risk of suffering severe penalties, civil and criminal, embodied in Sections 315 and 316 of the Act, 16 U.S.C.A. §825 n and 825 o."

Under the *Illinois Central* case, the Commission's leading authority, therefore, the Commission's order of January 26, 1937, was exactly what the Commission designated it and intended it to be, namely, an order. It is still that and nothing more, despite the Commission's attempted investiture of it with chameleon-like qualities, which enable it to start life as an order, so denominated, spontaneously transform itself into something "in the nature of a subpoena duces tecum", then make the complete change into "such a subpoena", subject to construction, rules, and authorities as such, and finally resume its character as an order because its usefulness as a "notice" or "subpoena" has ended. Such an attempt by the Commission to obscure the true nature of its order by merely pinning a different label on it so as to prevent its being held reviewable, is too transparent for serious consideration.

Conclusion

In *Jones* v. *Securities and Exchange Commission, supra,* this Court had occasion to point out the dangers of encroachments on private rights resulting from illegal

assumptions of power by the numerous administrative bodies which the Congress has deemed necessary to our government. The arbitrary action condemned in that case, which the Court stated could not coexist with the rule of the Constitution, was no greater abuse than that disclosed to this Court in the case at bar. Fully apposite is this Court's statement in the *Jones* case:

> "To escape assumptions of such [arbitrary] power on the part of the three primary departments of the government, is not enough. **Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well.**"

Only a week ago this Court, in effect, restated the guides for administrative action,* and said:

> "**The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.** On the contrary, it is in their manifest interest.
>
> "For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, **they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.**"

The record in this case discloses a wide departure by the Commission from those basic concepts.

A determination by this Court that the Commission's order of January 26, 1937 is not a reviewable order would

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* *Morgan* v. *United States,* No. 581, October Term 1937, decided April 25, 1938.

be far reaching in its consequences and implications. **It would mean that any administrative agency of the Government could proceed at any time with any investigation, no matter how injurious, and complete it whether it had the power to do so or not, wholly free of any restraint whatever.**

There would remain no possibility of restraint, even where there had been a judicial determination that the assumed power did not exist. Under this Court's decision in *Meyers* v. *Bethlehem Shipbuilding Corporation* (No. 181, October Term, 1937), it is plain that the District Courts may not afford relief by injunction. **Should this Court determine that what on the face of the statute is an administrative remedy with a right of judicial review, must be construed as excluding from its terms investigatory orders, the sole remaining safeguard against the appropriation of unauthorized power, and of the maintenance of proper standards of administrative action, will be removed.**

That a method for judicial supervision **should** exist is manifest. While there is a presumption that administrative bodies will act properly, there cannot be overlooked the obvious tendencies to arbitrary action which are particularly inherent in investigatory proceedings by administrative agencies. They are at once the prosecutor who calls the proceeding into being, the tribunal before which, as well as by which, the facts are adduced, the court which passes on the relevancy and competency of the evidence, the jury who determine what the facts are, and finally, the judge who makes the decree based on them. As was stated in the recent inaugural address of the President of the American Bar Association, there is reason for concern "* * * **with one body making the rules of the game, playing the game as one of the teams, and**

acting as umpire at the same time, and then writing up the newspaper reports." Such procedure is necessarily one-sided, and requires greater safeguards of judicial supervision than are necessary in the case of true judicial proceedings, where the court has no self-interest in the commencement of the litigation, in the parties to it, or in the result.

Time and again this Court has recognized the dangers which are bound up with broad investigatory powers. It has declared that the purpose of an investigation must be a legitimate one. It has decided that even the development of desirable information cannot validate an investigation unlawful in its inception. It has affirmed:

> "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow finds no countenance in the American system of government." (*Jones* v. *Securities and Exchange Comm., supra,* at pp. 26-27, 29.)

We respectfully submit that a reversal of the decision of the Circuit Court of Appeals in this case will be tantamount to a declaration by this Court that constitutional or legal restraints upon investigations by Federal administrative agencies, however improper, no longer exist.

THE JUDGMENT UNDER REVIEW SHOULD BE AFFIRMED.

Respectfully submitted,

WALTER BIDDLE SAUL,
Counsel for Respondents.

C. EDWARD PAXSON,
EDWARD F. HUBER,
GEO. J. BANIGAN,
of Counsel.

Appendix

Federal Power Act, Section 313, in full text:

"Sec. 313(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Com-

mission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

WALTER BIDDLE SAUL,
Packard Building,
Philadelphia, Pa.,
Counsel for Respondents.

C. EDWARD PAXSON,
EDWARD F. HUBER,
GEO. J. BANIGAN,
61 Broadway,
New York, N. Y.,
Of Counsel.

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RESPONDENTS' SUPPLEMENTAL BRIEF*

Statement

It is not the purpose of this brief to consider isolated statements or arguments of the Commission, whose brief was received after respondents' main brief had been printed, but rather to discuss the basic questions which underlie the entire case, and which may aid this Court in reaching its decision.

* This brief is filed with leave of the Court.

It is fully shown in respondents' main brief (Point II, pp. 10-28) that the Commission's order of January 26, 1937, is *per se* a reviewable order within the purview of Section 313 of the Federal Power Act. That order having there been shown to be subject to the general appellate jurisdiction of the Circuit Court of Appeals, there will here be considered:

(I)—Whether the Circuit Court of Appeals had the power, under Section 262 of the Judicial Code, to issue a writ to protect prospective appellate jurisdiction, where no appeal had actually been taken;

(II)—Whether in this case there was in fact prospective appellate jurisdiction,—including a consideration of the exact function of the "application for rehearing" provided for in Section 313 of the Federal Power Act.

(III)—The reasons why prospective appellate jurisdiction was being destroyed; *as proved by the Commission's own statements;* and

(IV)—Whether the judgment of the court below is vague, or indefinite, or not in accordance with the usages and principles of law.

I

THE CIRCUIT COURT OF APPEALS HAD THE POWER, UNDER SECTION 262 OF THE JUDICIAL CODE, TO ISSUE ITS PROCESS TO PROTECT PROSPECTIVE APPELLATE JURISDICTION, ALTHOUGH NO APPEAL WAS ACTUALLY BEFORE IT.

Section 262 of the Judicial Code,* the so-called "All Writs" section, has been expressly held by this Court to grant to the Circuit Courts of Appeals full power to issue all writs in the nature of mandamus, injunction, etc., which may be necessary or advisable for the protection of their jurisdiction, in all cases within the general appellate jurisdiction of those courts. Certain earlier cases considered that the issuance of a writ to protect appellate jurisdiction was authorized only where an appeal had actually been perfected, but was unauthorized to protect a prospective appellate jurisdiction. There were likewise cases holding the contrary view. The conflict was definitely set at rest by this Court in its decision in *McClellan* v. *Carland,* 217 U. S. 268 (1910).

In that case the petitioners had applied to the Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus against the judge for the Federal Circuit Court for North Dakota, to require him to set aside certain orders staying proceedings in a pending action. The judge had stayed proceedings in his court because another action was then pending in the state courts involving the same

* "Power to Issue Writs. * * * The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

subject matter. No appeal had, of course, as yet been taken to the Circuit Court of Appeals, nor could any have been taken at the time. That Court declined to issue its writ, sustaining the contention that it was without power to do so because its appellate jurisdiction had not yet attached. This Court *reversed* the Circuit Court of Appeals, holding (p. 279):

> "Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in §716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with §12 of the Court of Appeals Act it gives to the Circuit Court of Appeals the authority, as this Court has, to issue writs of *scire facias,* and all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.
>
> "In this case it appears that the original action commenced in the Circuit Court of the United States **might** have been taken on appeal to the Circuit Court of Appeals. • • • There are not wanting decisions in the Federal Courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. **But we think it is the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.** • • •
>
> • • •

"Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."*

It is therefore clear that in the case at bar, as in the *McClellan* case, the fact that respondents had not perfected an appeal to the Circuit Court of Appeals and, as will hereinafter be shown, were not and are not yet in a position to do so, did not deprive that Court of authority to issue its injunctive decree in the exercise of the powers conferred upon it by the "All-Writs" section of the Judicial Code.

II

THERE WAS IN FACT PROSPECTIVE APPELLATE JURISDICTION IN THE COURT BELOW.

The Basic Difference Between the Parties in this Case

Every point of difference in this case between the Commission and the respondents, with the exception of the single question as to reviewability *per se* of the Commission's order of January 26, 1937, may be resolved ultimately to a disagreement as to the nature and function of a Petition for Rehearing under Section 313 of the Federal Power Act.**

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* Emphasis and parenthetical matter within quotations throughout, ours.

** Section 313 of the Federal Power Act is printed in full text as an appendix to respondents' main brief.

We submit that the Commission has misconceived the true nature and function of a Petition for Rehearing; and that under the clearly correct concept of its nature and function there can be no question but that: (a) the Circuit Court of Appeals had prospective appellate jurisdiction, (b) the conduct of the Commission was destructive of it, and (c) the decree of the Court below was entirely proper in substance and in form, not vague, and may be complied with easily and with certainty.

The Function of the "Petition for Rehearing"

Congress has set forth in Section 313 of the Federal Power Act the procedure for obtaining judicial review of a Commission order. The procedural design thus made effective upon the enactment of Parts II and III of the Federal Power Act in 1935, constitutes an effort by the Congress to deal with the question of court review of Commission orders in a comprehensive and rational manner that will at once protect the Commission against frivolous appeals, and at the same time afford aggrieved parties full opportunity for judicial review.

Under Section 313 of the Act, a party deeming itself aggrieved by a Commission order may file a written petition in the appropriate Circuit Court of Appeals praying for a modification or a vacation of that order. Such petition must, however, be filed "within sixty days after the order of the Commission upon the application for a rehearing",* and in turn a Petition for Rehearing must have been filed within thirty days after the issuance of the order complained of.**

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* §313 (b).

** §313 (a).

The Petition for Rehearing **must** set forth specifically the grounds upon which the application is based, and the objections made by the aggrieved party. The Commission, on such application, may grant the rehearing or deny it, or may abrogate or modify the order objected to without further hearing. The order to which objection is made is **not** vacated or stayed by the application for rehearing, nor by the granting thereof, for it is provided by Section 313(c), that: "The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."

The Act specifically provides that:

> "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."*

and further, that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."**

It is thus clear that a Petition for Rehearing filed to a Commission order is *an absolute prerequisite* to a court review of that order. This function is important and significant. It was obviously the design of the Congress that the Petition for Rehearing shall apprise the Commission that a party considers himself aggrieved by an

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* §313 (a)

** §313 (b).

order made by it; that if continued in effect by the Commission in its original substance he proposes to obtain a court review thereof; and that he has certain objections to the order which he specifies in his petition. The Commission, if it believes the objections well taken, may make suitable correction of its order; and if it does not, an appeal may be perfected. The Petition for Rehearing protects the Commission from surprise, and from not having *itself* had *first* the opportunity to consider the objections, pass upon them, and meet them if it believes them well taken. Thus, unnecessary appeals are avoided, both so far as the Commission and the parties before it are concerned.

These considerations of the nature of the appellate process under Section 313 of the Federal Power Act and the function thereunder of a Petition for Rehearing, make it immediately apparent that where a rehearing is granted, as was done in the case at bar, **its sole purpose is to enable the Commission to consider and to pass upon the *petitioner's* objections to the questioned order** before any objections not sustained are reviewed by the appellate court. If the order is vacated upon the filing of the Petition for Rehearing, or if it is vacated after hearings are held on the objections made therein, the aggrieved party is no longer aggrieved and needs no appeal. But if the Commission affirms, or merely modifies, the order against which the Petition for Rehearing was directed, then the aggrieved party is in a position to take his appeal.

It is the order of the Commission **after** the conclusion of the proceedings under the Petition for Rehearing, that is the order referred to in the Act when it states, in Section 313(b), that "after the order of the Commission upon

the application for rehearing'' an appeal may be taken. It is **this** order, determining the objections raised **by the aggrieved party** in its Petition for Rehearing and affirming, or modifying, the order objected to, that permits the party to institute an appeal from the order objected to, as so affirmed or modified. The *''order* of the Commission upon the application for rehearing'' contemplated by the Act, is the **order yet to be made** in this case, determining the objections raised in the Petition for Rehearing, and in accordance with such determination, affirming, modifying or vacating the order of January, 1937.*

It was manifestly **not** intended by the Congress that a judicial review of the objections should be had until the Commission had opportunity first to make and complete an administrative review. Indeed, to contend for any contrary construction does violence not only to the plain intent of the statute, but to the well established rule of law that a judicial remedy is not open where administrative remedies have not been exhausted.

There is no dispute in this case as to this salient fact: The Commission has never passed upon the objections raised in respondents' Petition for Rehearing with respect to the order of January 26, 1937. Concededly, a rehearing was granted. But, concededly, the minute of the Commission granting the rehearing did not purport to de-

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* The Commission itself, in its Supplemental Brief below (at p. 36), admitted that—

> "If the order of January 26, 1937, is a reviewable order, Section 313 of **the Federal Power Act requires that before the appellate jurisdiction of this Court (C.C.A.) may attach to review such order,** the aggrieved party must file an application for rehearing with the Commission and **no appeal will lie from such order (of January, 1937) until the Commission by subsequent order affirms, modifies, or abrogates the challenged order."**

cide the objections raised in the Petition for Rehearing, nor was it intended thereby to grant the prayers of that petition, nor did it do so.* **The rehearing was granted for the express purpose of considering and determining respondents' objections.** Thus, it is plain that **until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal** to the Circuit Court of Appeals should the Commission's determination make that necessary.

While there was, therefore, no actual appeal before the Court below,—nor could there be, as the Court properly recognized,—there did exist prospective appellate jurisdiction which the Court had the power to protect, when protection was necessary.

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* At R. 49 the following excerpt from the minutes of the Commission appears:

> "The Commission, having considered the matters involved in the inquiry and investigation instituted against Metropolitan Edison Company, et al, Docket IT-5015, and the petition for rehearing filed therein by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, under date of February 23, 1937, grants said petition for rehearing and assigns the matters involved in this proceeding for hearing in the hearing rooms of the Commission in Washington, D. C. on the 14th day of April, 1937, at 10 a. m.
>
> "The Secretary is directed to give notice to petitioners that the petition for rehearing has been granted and advise all parties in interest of the time and place of hearing."

This minute of the Commission is obviously not *an order,* and is obviously not "the order of the Commission upon the application for rehearing" contemplated by Section 313(b) of the Federal Power Act as the completion of the administrative process, within the sixty days after which an appeal to the Circuit Court of Appeals may be taken.

III

THE FACTS REQUIRED ACTION BY THE COURT BELOW TO PROTECT ITS PROSPECTIVE APPELLATE JURISDICTION — AND THE COMMISSION'S OWN STATEMENTS PROVE IT.

If respondents objected merely to the rulings of an administrative officer on the relevancy of evidence, they would have no standing in this Court. Their case, however, is far more than that. It rests on the objection to the completion of the investigation called for by the Commission's order of January, 1937, under the guise of considering objections to its authority in law to make that order. **The *proof* of this fundamental assertion is of the utmost importance to respondents,** because if it is untrue, or if its truth is misapprehended or overlooked by the Court, respondents may be deprived of the relief properly granted by the Court below. Fortunately, the Commission itself, in its brief below, has supplied unquestionable proof.

The subject matter of the investigation under the questioned order of the Commission is, briefly stated, the propriety of service contracts and working arrangements between respondents and third persons claimed to be "affiliated" with them. Respondents' objections raised by their Petition for Rehearing questioned the Commission's authority in law to conduct an investigation of this subject matter. It is plain that *if the Commission has no authority to investigate the propriety of contracts with "affiliates,"* **the determination of "affiliation" is a matter of utter indifference.** It should likewise be plain that, *after adjourning without day* proceedings under its questioned order, and as an incident to a rehearing granted to

determine the challenge of its authority, the Commission may not attempt to determine who may be "affiliated" with respondents, and in doing so inquire into contracts and working arrangements and their propriety, *i. e.,* **the very subject matter of the investigation itself.** But this is exactly what the Commission has undertaken to do. It has done so by injecting in the rehearing an **additional** "jurisdictional" question not raised by respondents, but of the Commission's own making.

The great vice of the Commission's position is that pursuit of its **additional** "jurisdictional" question is, *on its own interpretation,* exactly coextensive with pursuit of the investigation under the questioned order of January, 1937.

In the Commission's brief below,* signed by its General Counsel, its then Solicitor, and one of its attorneys, the inquiry to be made under its questioned order of January, 1937, is defined thus unequivocally (at page 4):

> "* * * The questions assigned for hearing related solely to the jurisdiction of the Commission and its authority, upon proper order, to examine the books, accounts, memoranda, and records of alleged non-affiliates within the limits specified by Section 301(c) of the Federal Power Act. The specific questions were:
>
> "a. Identification of charges emanating from alleged non-affiliates reflected on the books of petitioners and relating to the business of petitioners.
>
> "b. Determination of the control of petitioners.
>
> "c. Determination of the control of alleged non-affiliates.

* For the Court's information, a copy of this brief will be filed by respondents with the Clerk of this Court.

"No other questions were assigned for hearing, or were intended to be assigned for hearing by the order of January 26, 1937."

At pages 25 and 26 of the Commission's same brief, it is stated:

> "The evidence introduced at the hearing which began on April 14, 1937, [upon the Petition for Rehearing] pertained exclusively to (a) the matters set forth in petitioners' plea to the jurisdiction of the Commission, **and** (b) the right and authority of the Commission to require by order the production of the books, records, memoranda, and accounts of the alleged non-affiliates for examination by representatives of the Commission. The petitioners introduced evidence relating to the jurisdictional questions raised by their so-called petition for rehearing. Thereafter counsel for the Commission began the introduction of evidence pertaining to the same jurisdictional questions **and also** jurisdictional facts upon which depended the right and authority of the Commission to require by order the production of the books, records, memoranda, and accounts of the alleged non-affiliates. **The specific jurisdictional questions were:**
>
> 1. Jurisdiction of the Commission over the person of petitioners.
>
> 2. Jurisdiction of the Commission over the subject matter of the inquiry and investigation instituted by order of the Commission under date of January 6, 1936.
>
> 3. **Jurisdiction of the Commission over alleged non-affiliates under Section 301(c) of the Federal Power Act, which necessitated—**
>
> (a) **Identification of charges emanating from alleged non-affiliates as reflected on the books of**

petitioners and relating to the business of petitioners.

(b) **Determination of the control of petitioners.**

(c) **Determination of the control of alleged non-affiliates.''**

Questions 1 and 2 were the objections raised by respondents in their Petition for Rehearing. Question 3 is the **additional** question fabricated by the Commission itself. When the Commission's own statement of the ''scope of the jurisdictional'' question of its own creation is contrasted* with its own statement of the investigation under the questioned order of January, 1937, there can be no possible doubt that **the Commission admittedly was proceeding under the guise of the rehearing** (the only proper function of which was to consider the objections raised by respondents' Petition for Rehearing), **with the investigation under the very order to which those objections were directed.**

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*COMMISSION'S STATEMENT OF ITS **Investigation** UNDER THE ORDER OF JANUARY 26, 1937 (Commission's Brief Below, p. 4)

''* * * The questions assigned for hearing related solely to the jurisdiction of the Commission and its authority, under proper order, to examine the books, accounts, memoranda, and records of alleged non-affiliates within the limits specified by Section 301(c) of the Federal Power Act. The specific questions were:

COMMISSION'S STATEMENT OF THE **Additional** JURISDICTIONAL QUESTION INJECTED BY IT ON THE REHEARING (Commission's Brief Below, p. 26)

''* * * Jurisdiction of the Commission over alleged non-affiliates under Section 301(c) of the Federal Power Act which necessitated:

(Footnote continued on following page)

To have completed the inquiry under the questioned order of January, 1937, would have rendered moot any determination by the Commission itself of its authority to investigate. It would likewise have rendered moot and destroyed the prospective appellate jurisdiction of the Circuit Court of Appeals to review the Commission's determination as to its powers. Obviously, once the investigation was completed, it could not be undone, regardless of any subsequent determination that the Commission had acted without authority.

Thus it plainly appears that the subject of the proceedings instituted in the court below was by no means a mere question of the relevancy of evidence admitted by a trial examiner in an administrative proceeding. It was objection to a course of conduct which was a frustration of respondents' administrative remedy under the Act, through a perversion of the functions of a Petition for Rehearing thereunder, which at the same time destroyed

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"(a) Identification of charges emanating from alleged non-affiliates reflected on the books of petitioners and relating to the business of petitioners.

"(b) Determination of the control of petitioners.

"(c) Determination of the control of alleged non-affiliates."

"No other questions were assigned for hearing, or were intended to be assigned for hearing by the order of January 26, 1937."

"(a) Identification of charges emanating from alleged non-affiliates as reflected on the books of petitioners and relating to the business of petitioners.

"(b) Determination of the control of petitioners.

"(c) Determination of the control of alleged non-affiliates."

On the Commission's own statement, the investigation contemplated under its questioned order of January 26, 1937, and the inquiry contemplated by its fabricated **additional** jurisdictional question injected in the rehearing, **are one and the same thing.**

the Circuit Court's prospective appellate jurisdiction. For, surely, it is a perversion of a statutory provision granting and controlling judicial review of Commission orders to employ the Petition for Rehearing prerequisite thereto as a device to nullify the very court review it is its function to facilitate, and to carry out the order as to which rehearing was granted to consider respondents' objections, *in defiance of those very objections.* **It was the Commission's *studied course of conduct*, constituting this perversion, and *not* incidental rulings of the trial examiner, with which the Court below was concerned, and it was that perversion, and nothing more, which the decree of the Circuit Court of Appeals was designed to stop.**

It is urged by the Commission that the Circuit Court's decree can not be sustained because it is contrary to "the usages and principles of law". If it is contrary to the usages and principles of law to put at an end a sham proceeding which made a mockery of the Act of Congress in pursuance of which it was purported to be undertaken, then "the usages and principles of law" are meaningless and empty phrases with no practical application to a state of facts which cries out for judicial intervention.

IV

THE DECREE OF THE COURT BELOW WAS ENTIRELY PROPER IN SUBSTANCE AND IN FORM. IT IS NOT VAGUE, BUT MAY BE COMPLIED WITH EASILY AND WITH CERTAINTY.

The decree of the court below is asserted by the Commission in its brief and argument to be fatally defective because of vagueness and indefiniteness. It is

neither vague nor indefinite. Both the Court's judgment (R. 62) and the simple guides stated in its opinion (R. 50) could easily be followed by the Commission, if it were willing to do so. Only because of the Commission's disingenuous assertion that it may inject into the rehearing, for consideration thereon, objections to its own order of its **own** fabrication, does there arise the slightest difficulty of compliance with the mandate of the Circuit Court of Appeals.

The judgment of the court below restrained the Commission:

> "* * * **from proceeding with its proposed inquiry and investigation** in accordance with its two orders of January 6, 1936, and January 26, 1937, **until the questions raised in the petition for rehearing are determined by it.**" (R. 62)

In its opinion the Court stated:

> "Coming to the merits of the case, when the petition [for rehearing] was filed and granted **it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed** in the orders of January 6, 1936 and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the

> determination of the issues will be speedy, final, and satisfactory.
>
> **Remanding the case, we express no opinion on the merits of the questions to be decided.** The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this Court of the orders of the Federal Commission and no order on the merits is now before us. **These proceedings were taken so that the questions would not be moot if and when they come here.**'' (R. 53)

The Commission knows, or should know, what are the **only** two issues raised in the Petition for Rehearing as to which evidence may be required. The Commission has only to limit its evidence to those two issues, and not attempt to extend it into the so-called **additional** question fabricated by the Commission, *i. e.*, the investigation under the questioned order itself, and there will be presented none of the difficulties such as those referred to at page 22 of the Commission's brief in this Court, concerning evidence of ''affiliation'' between respondents and third persons: for questions of ''affiliation'' cannot possibly arise in considering the objections to the questioned order raised by respondents.

So that this may be entirely clear to this Court, we shall point out specifically the objections raised in the Petition for Rehearing. Their mere statement discloses how sharply defined are the issues presented before the Commission, how apt was the direction of the court below, and how readily it may be complied with.

The Two Issues on Rehearing Which Require Evidence for Their Determination

(1) Three of the respondents raised objections that the Commission was without jurisdiction of their persons in the premises.* These objections were based on the claim that the respondents raising them are not "public utilities" as defined in the Act. A "public utility" is so defined as a "person who owns or operates facilities subject to the jurisdiction of the Commission under this Part".** The provisions of the Part referred to (Part II), apply only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, and confer on the Commission jurisdiction only over the facilities for such transmission or sale of electric energy. Concededly, factual evidence is necessary to resolve the objections. Such evidence in support of their objections was offered by respondents. The Commission and its engineering and legal staff know very well the kind of evidence required on this issue, and compliance with the decree below in this regard presents no problem whatever.

(2) The second objection requiring evidence for its proof, raised by respondents in their Petition for Rehearing, was that the true purpose of the investigation was to supply information to the Pennsylvania Commission for use in penalty proceedings under state law, and that such purpose was improper.*** The respondents offered

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* Petition for Rehearing, Paragraph Eighth (R. 15).

** Federal Power Act, §201(e).

*** Petition for Rehearing, Paragraphs Ninth and Twenty-fourth (R. 16 and 20).

testimony to establish the existence of that purpose. The Commission has since conceded it, so that that issue of fact is no longer in the case. There remains, therefore, only the pure question of law as to whether the Commission's motives are material in determining its statutory authority to investigate.

The Remaining Issues on Rehearing—None of Which Require Evidence for Their Determination

The Petition for Rehearing [Paragraph Twentieth (R. 19)] alleges:

> "The Commission has not been vested by the Federal Power Act, or otherwise, with jurisdiction or power to determine the propriety of contracts or working arrangements between public utilities and others, or the reasonableness of charges thereunder. * * *"

Whether or not this is true is a pure question of law requiring no evidence for its determination.

The Petition for Rehearing [Paragraph Twenty-first (R. 19)] alleges:

> "The Federal Power Act contains no provision requiring that services rendered to public utilities be rendered at cost, and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by public utilities for services rendered to them exceed the cost thereof. * * *"

Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.

The Petition for Rehearing [Paragraph Twenty-first (R. 19)] alleges:

> "* * * The Commission is so proceeding despite the fact that the Federal Power Act contains no provisions whatever prescribing any standards of propriety for such contracts, working arrangements, and practices. The Commission is so proceeding despite the fact that there are no rules or regulations whatever issued by the Commission pursuant to the authority of the Federal Power Act, or otherwise, containing any provisions prescribing standards of propriety for such contracts, working arrangements, practices, and charges."

Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.

The Petition for Rehearing [Paragraph Twenty-third (R. 20)] alleges:

> "* * * The Commission is so proceeding, despite the fact that the Commission has no jurisdiction or power to adopt rules or to issue orders relating to such contracts, working arrangements, practices, or charges, in the absence of express statutory provision relating thereto in the Federal Power Act, or otherwise, and despite the fact that neither the Federal Power Act nor any other statute contains any such provisions."

Whether or not this is true is likewise a pure question of law requiring no evidence for its determination.

These four jurisdictional objections cover completely the subject matter of the Commission's inquiry and investigation. In addition to those objections, it was asserted in the Petition for Rehearing that forced compliance with the order of January, 1937 would violate the respondents'

rights under Article 1, Section VIII, and amendments IV, V and X of the Constitution of the United States.* There can be no question that these objections are purely questions of Constitutional Law which do not require for their decision any factual testimony.

It thus appears that the objections raised in the Petition for Rehearing do not require, except in a single instance, any factual testimony whatever either in support of them, or to rebut them, or to decide them. To resolve these objections it is necessary only to look to the face of the order objected to, and to the plain terms of the Federal Power Act, and the Constitution. And, in the single instance where jurisdiction or the lack of it depends on factual evidence, the character of such evidence is well known to the Commission, and could not, by the wildest stretch of the imagination, be constituted of matters such as are discussed in the second section of the Commission's brief in this Court.**

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* Petition for Rehearing, Paragraphs Twenty-fifth, Twenty-seventh, Twenty-eighth and Thirtieth (R. 21 and 22).

** On this analysis of the objections raised by the Petition for Rehearing, the Court may readily see that evidence, *e. g.,* as to statements, vouchers and bills covering various charges or payments (Stenographer's Minutes of Proceedings before the Commission, pp. 497-8, 505-7), as to expenses in opposing the Wheeler-Rayburn Bill (S.M. pp. 387-88), as to charges for stationery and supplies (S.M. pp. 439-441), as to whether or not a foreign corporation was properly domesticated in Pennsylvania (S.M. pp. 308-9), as to contents of minute books of foreign corporations (S.M. p. 305), as to what may or may not constitute sound accounting practice (S.M. pp. 464-6, 473-4), and as to the business relations of persons other than respondents with companies not even claimed to be in any way related to respondents (S.M. pp. 419-20), while relevant to the furtherance of the investigation under the questioned order, had no relation to the determination of respondents' objections, raised in the Petition for Rehearing, that the Commission was without legal authority to carry on the investigation—objections which it was the Commission's plain duty to determine before it rendered them moot by the assumption and exercise of the questioned powers.

Properly viewed, therefore, the decree of the court below is anything but vague and indefinite. Under that decree, the Commission may at once proceed with the determination of the objections raised in the Petition for Rehearing, and above stated. A cooperative compliance with the Circuit Court's suggestion could well bring to fruition the hope expressed by that Court, "that the determination of the issues will be speedy, final and satisfactory".

Conclusion

We again urge upon the Court that unless the relief accorded by the Circuit Court of Appeals is sustained, there can not be in this case, *and, what is far more important to the citizenry at large,* **there can not be in any other case,** any relief against the prosecution by an administrative body of an unauthorized investigation. The Commission's brief in this Court makes this clear. At page 9 it is stated:

> "So far as appears, the investigation will not even culminate in an appealable order."

Again at pages 17 and 18 thereof it is repeated:

> "The order was entered in an investigation which for aught that appears would not even culminate in an appealable order."

Under this Court's decision in *Meyers* v. *Bethlehem Shipbuilding Corporation* (No. 181, October Term, 1937) the District Courts are powerless to afford injunctive relief against administrative investigations. If, as the Commission contends, an administrative investigation may be completed without culmination in an order that is appeal-

able to the Circuit Court of Appeals in accordance with the Act, then this Commission, or any other administrative body, may proceed with investigations utterly beyond their powers, and do so **with complete freedom from any judicial restraint by this or any other Court in the land.**

To urge that the authority to investigate may be tested on refusal to comply with a subpoena, is indeed no answer: for the Court must surely appreciate that an investigation by an administrative body, equally as well as an investigation conducted by such an inquisitorial body as a Grand Jury, may be fully completed without calling the person under investigation to appear and to testify. In the case of a Grand Jury investigation, the proceedings are clothed in secrecy. The investigatory proceedings of administrative bodies, on the contrary, are notoriously garbed in publicity. The conclusions of a Grand Jury contained in its presentment are generally followed by a judicial proceeding, in which the validity of the charges are tested with all due safeguards of constitutional rights. But under the Commission's view of the law there can be no test, judicial or otherwise, of the validity of the conclusions of an investigatory administrative agency, no matter how far it exceeds its authority in investigating. Yet the same conduct by a court of law has long since been recognized as an unconstitutional denial of due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714; *Scott* v. *McNeal*, 154 U. S. 34; *Twining* v. *New Jersey*, 211 U. S. 78.

The admonitions of this Court in the *Jones* case* against the appropriation of unauthorized power by admin-

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* *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 24, 27.

istrative agencies, its recent admonition that administrative agencies should "accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play"*—these admonitions, and many others like them, and the basic principles of our government which underlie them—all must be discarded and forgotten if the Commission's contentions in this case are to prevail. The implications from such an unprecedented departure from our firmly established institutions would be so far reaching that only the clearest mandate of the people, speaking through the Congress, can require such a result.

There is no such mandate. There is no such requirement.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

WALTER BIDDLE SAUL,
Counsel for Respondents.

C. EDWARD PAXSON,
EDWARD F. HUBER,
GEO. J. BANIGAN,
of Counsel.

May 6, 1938.

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* *Morgan* v. *United States*—No. 581, October Term, 1937, Decided April 25, 1938.

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SUPREME COURT OF THE UNITED STATES.

No. 915.—October Term, 1937.

Federal Power Commission, Petitioner,
vs.
Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 23, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

On January 6, 1936, the Federal Power Commission instituted an investigation to determine the "conditions, practices, and matters regarding the ownership, operation, management, and control" of the respondent corporations. The order directed respondents to file with the Commission copies of contracts and statements of working arrangements between respondents and persons controlling them, and statements of charges on respondents' books for 1934 and 1935 representing payments made and obligations incurred to such persons. Respondents were also directed to make their books, records, etc., available for examination by the Commission's representatives. The investigation was instituted on representations of the Governor and Public Service Commission of Pennsylvania.

Respondents challenged the jurisdiction of the Commission to make the order, and, reserving their right to question its legality, they furnished various data and information. Following an examination of the books and records of respondents, the Commission's examiners submitted a report on December 10, 1936.

Thereupon the Commission, on January 26, 1937, made an order providing that a hearing should be held on March 3, 1937. The order recited that the respondents had reported charges appearing upon their books which represented payments made and obligations incurred to named persons as (a) "conceded affiliates" and (b) "not conceded affiliates", respectively; that the exam-

ination of the books and records of respondents and of admitted affiliates disclosed transactions between respondents and additional named persons, and that the accounting representatives of the Commission had submitted a report indicating that certain named persons "control respondents, or are controlled by the same persons which control respondents". The order then directed respondents to appear at the hearing, as stated, and to present information bearing upon the question of control and specifically showing (1) their form of organization, respectively, (2) their articles of incorporation, partnership agreements or other documents of organization, (3) the names and addresses of partners, directors, officers, trustees and agents, (4) the ownership held by such persons "in or over any other person named above", as well as the manner by which such ownership was maintained, and (5) such other data as might from time to time be required by the Commission. The order further directed that a copy of the report prepared by the accounting representatives of the Commission should be served on each person named, and the Commission gave notice that the hearing would be had by the Commission sitting jointly with the Public Service Commission of Pennsylvania. See Federal Power Act, Sec. 209(b), 49 Stat. 853.

Respondents then filed with the Commission a petition for rehearing as to the order of January 26, 1937, asking for the vacating of that order and the termination of the proceeding initiated by the order of January 6, 1936. Respondents contended that the Commission lacked jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, and, in particular, (1) that the Commission was without power to investigate for the purpose of supplying information to a state commission for use in local proceedings for violations of local law, and, (2) that as to three of the respondents the Commission was without jurisdiction of their persons because they were not "public utilities" as defined in the Federal Power Act.

The Commission thereupon adjourned without day the hearing directed by the order of January 26, 1937. Later, the Commission granted the petition for rehearing and assigned "the matters involved" for hearing on April 14, 1937. Respondents then appeared and introduced evidence tending to support their objections to the

Commission's jurisdiction. The Commission's counsel then introduced evidence on its behalf. Respondents objected to its admissibility upon the ground that it was immaterial to the issues presented by the petition for rehearing. Their objection was overruled and respondents then asked the examiner to certify to the Commission the request to define the issues to be determined on the petition for rehearing and to instruct its representatives that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced. The examiner refused and respondents then presented a like request to the Commission, which was denied on April 20, 1937, for the reason that its rules of practice did not provide for that method "of *interim* review of the examiner's rulings". Upon remand to the examiner, he again ruled against respondents, stating that their rights could "be amply protected by the usual method of exceptions" and argument thereon.

Respondents then presented, on April 21, 1937, to the Circuit Court of Appeals a petition asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. The Circuit Court of Appeals, on July 6, 1937, issued the rule to show cause, as prayed, returnable on October 4, 1937, and on September 7, 1937, granted a temporary stay. The Commission made its return to the rule and asked for a dismissal of the petition. The Circuit Court of Appeals rendered its decision on January 27, 1938. Its decree remanded the case to the Commission "for determination in accordance with the opinion" of the court and restrained the Commission "from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it".

In its opinion the court stated that the only issues of fact raised by the petition for rehearing and the evidence of the respondents were that three of the respondents were not "public utilities" as defined by the Federal Power Act and that the purpose of the investigation was to supply information to the Pennsylvania Com-

mission for use in local proceedings designed to impose penalties under the state law. 94 F. (2d) 943, 945. The court said (*id.*, p. 946):

"Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final and satisfactory.

"In remanding the case we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this Court of the orders of the Federal Commission and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here".

This Court granted certiorari and the cause has been argued. We are of the opinion that the Circuit Court of Appeals had no jurisdiction to enter the decree.

First.—There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.

The provision conferring appellate jurisdiction on the Circuit Court of Appeals in relation to orders of the Federal Power Commission is found in Section 313 of the Federal Power Act, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 860, 861.[1]

[1] "Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may

Section 313(a) provides that any person aggrieved by an order of the Commission may apply for a rehearing within thirty days after its issuance and that no proceeding to review any order of the Commission shall be brought unless there has been an application for a rehearing thereon.

Respondents say that under this provision they could not ask review of the order of January 26, 1937, until they had sought a rehearing. They did seek a rehearing and it was granted. No appeal from the order granting it would lie and none was attempted. Respondents do not contend that there was any appeal from an order, or any application for a review of an order, pending before the Circuit Court of Appeals. On the contrary, respondents say that the Commission "has never passed upon the objections raised in respondents' petition for rehearing with respect to the order of January 26, 1937"; that "concededly, the minute of

be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347)".

the Commission granting a rehearing did not purport to decide the objections raised in the petition for rehearing"; and that "until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal to the Circuit Court of Appeals should the Commission's determination make that necessary".

Second.—Respondents seek to sustain the action of the Circuit Court of Appeals by virtue of the authority conferred by Section 262 of the Judicial Code which provides that the federal courts shall have power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". The argument is that the Circuit Court of Appeals could intervene to protect its prospective appellate jurisdiction. We are of the opinion that this contention is unsound and that the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect.

The argument proceeds on the view that the order of January 26, 1937, despite its preliminary character, was a reviewable order subject only to the requirement that an application for rehearing should first be made. Reliance is placed on Section 313(b) of the Federal Power Act that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals". But neither this language, nor that of Section 313(a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

The context in Section 313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered". The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and

the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

There are persuasive analogies in the construction of provisions for the review of the orders of other administrative bodies. The Urgent Deficiencies Act of October 22, 1913,[2] provides for cases brought to enjoin, set aside, or suspend "*any order*" of the Interstate Commerce Commission. But this Court has held that "there are many orders of the Commission which are not judicially reviewable under this provision". See *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, 309, and cases cited. In *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82, the Interstate Commerce Commission had made an order for a hearing upon an issue of reparation. The Railroad Company contended that the Commission had no jurisdiction to award damages in the case presented. A decree of the District Court, enjoining the Commission from proceeding with the hearing was reversed by this Court with directions to dismiss the petition. The "order" was not of the sort which brought it within the purview of the statute. It was a mere step in procedure. See, also, *New York, Ontario & Western Rwy. Co.* v. *United States*, 14 F. (2d) 850, affirmed 273 U. S. 652. Negative orders of the Commission are not reviewable. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, 414. A final report by the Commission on value under Section 19a of the Interstate Commerce Act, though called an order, is not reviewable. *United States* v. *Los Angeles & Salt Lake R. R. Co.*, *supra*. Compare *United States* v. *Atlanta, Birmingham & Coast R. R. Co.*, 282 U. S. 522, 527; *Great Northern Railway* v. *United States*, 277 U. S. 172, 181, 182; *United States* v. *Griffin*, decided February 28, 1938; *Shannahan* v. *United States*, decided April 4, 1938. With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for review by the Circuit Court of Appeals. *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48; *Ames Baldwin Wyoming Co.*

[2] 28 U. S. C. 47.

v. *National Labor Relations Board*, 73 F. (2d) 489, 490; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617, 619; 298 U. S. 1, 14. So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. *Myers* v. *Bethlehem Shipbuilding Corporation*, decided January 31, 1938. See, also, *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441.

The Commission's order of January 26, 1937, (a) fixed a date for hearing, (b) required respondents to appear, and (c) required them to produce the information and documents described. In fixing a date for hearing, the order was nothing more than a notice. *United States* v. *Illinois Central R. R. Co.*, *supra*, p. 89. The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a federal court under Section 307(c)[3] Upon such an application, the court may require attendance, testimony and the production of books and papers touching the matter under investigation and failure to obey such an order of the court may be punished by it as a contempt. We think that this provision embraces all cases of alleged "contumacy" on the part of any person who is required to attend, give testimony, or produce documents. Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity

[3] Subdivision (c) of Section 307 of the Federal Power Act is as follows:

"(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both".

o contest its validity. See *Jones* v. *Securities and Exchange Commission, supra.* In the instant case no such application by the Commission has been made. Section 307(c) also provides that ny person who willfully fails or refuses to attend and testify, or roduce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and be subject to fine and mprisonment. The qualification that the refusal must be "willful" fully protects one whose refusal is made in good faith and pon grounds which entitle him to the judgment of the court before bedience is compelled.

The Commission's order of January 26, 1937, lay outside any ppellate jurisdiction conferred by the statute upon the Circuit Court of Appeals. In that view, Section 262 of the Judicial Code ives no support to the decree under review and its injunction and nstructions to the Commission must be regarded as unauthorized.

The decree of the Circuit Court of Appeals is reversed and the ause is remanded with directions to dismiss the respondents' etition.

It is so ordered.

Mr. Justice ROBERTS and Mr. Justice CARDOZO took no part in he consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.